APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 24

JOSEPH WALLER, JR.,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

PETITION FOR WRIT OF CERTIORARI
FILED DECEMBER 16, 1968
CERTIORARI GRANTED JUNE 23, 1969

INDEX TO APPENDIX

Relevant Docket Entries

IN AND FOR PINELLAS COUNTY,

CIRCUIT CRIMINAL CASE No. 16,743

	Date of Filing
Direct Information for Grand Larceny	Jan. 18, 1967
Arraignment—plea of not guilty	Feb. 16, 1967
Motion to quash information	Apr. 24, 1967
Order denying motion to quash	Apr. 25, 1967
Trial (continued from April 25, 1967)	May 2-4, 1967
Verdict of guilty	May 4, 1967
Motion for new trial	May 23, 1967
Order denying motion for new trial	July 6, 1967
Judgment and sentence	July 6, 1967
Motion to reconsider sentence	July 19, 1967
Motion to vacate and set aside judgment, conviction and sentence	Aug. 21, 1967
Order denying motion to reconsider sentence	Aug. 28, 1967
Order denying motion to vacate and set aside judgment, etc.	Aug. 28, 1967
Notice of appeal	Oct. 3, 1967

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT, CASE No. 67-426

Opinion, affirming judgment of circuit court	Aug. 28, 1968
Rehearing denied	Sept. 17, 1968

Documents Filed in the Supreme Court of Florida as Record to Accompany Suggestion for Writ of Prohibition, April, 1967

INDEX TO THE RECORD

Direct Information for Grand Larceny

[R-1]

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PINELLAS COUNTY

FALL TERM, in the year of our Lord one thousand nine hundred sixty-six

16,743 Ct. Cr.

STATE OF FLORIDA,

VS.

JOHN WESLEY BRYANT, LEMUEL GREEN, CRAWFORD LOUIS JONES, JOSEPH WALLER, JR., JOSEPH WALLS *(EM—"s" in Walls deleted—amended instanter 2/2/67)*, TOMMY WILLIAMS.

In the Name and by the Authority of the State of Florida:

CLAIR A. DAVIS, State Attorney for the Sixth Judicial Circuit of Florida, in and for Pinellas County, prosecuting for the State of Florida, in the said County, under oath, information makes that John Wesley Bryant, Lemuel Green, Crawford Louis Jones, Joseph Waller Jr., Joseph Walls *(EM—"s" in Walls deleted—amended instanter 2/2/67)* and Tommy Williams of the County of Pinellas and State of Florida, on the 29th day of December in the

year of our Lord, one thousand nine hundred sixty-six, in the County and State aforesaid, one painting, of a value in excess of $100.00, lawful money of the United States of America, a more particular description of which painting is to the State Attorney unknown, of the goods, chattels and property of the City of St. Petersburg, Florida, a municipal corporation, then and there being found, did feloniously steal, take and carry away; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

CLAIR A. DAVIS
State Attorney for the Sixth Judicial Circuit of the State of Florida, prosecuting for said State

Information for Unlawful Assembly

[R-2]

IN THE CIVIL AND CRIMINAL COURT OF RECORD OF PINELLAS COUNTY, FLORIDA

JANUARY TERM, in the year of our Lord one thousand, nine hundred and sixty-seven

---

STATE OF FLORIDA,

vs.

JOSEPH WALLER, JR.

In the Name and by the Authority of the State of Florida:

ALAN R. WILLIAMS, Prosecuting Attorney, for the County of Pinellas, prosecuting for the State of Florida, in said County, under oath, information makes that Joseph Waller, Jr. of the County of Pinellas and State of Florida on the twenty-ninth day of December in the year of our Lord, one thousand, nine hundred sixty-six, in the County and State aforesaid, did then and there meet together with two or more persons to commit a breach of the peace, or to do any other unlawful act, contrary to Section 870.02, Florida Statutes, and Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

ALAN R. WILLIAMS
Prosecuting Attorney,
Pineallas County, Florida

Information for Malicious Destruction of Public Property

[R-3]

IN THE CIVIL AND CRIMINAL COURT OF RECORD OF PINELLAS COUNTY, FLORIDA

JANUARY TERM, in the year of our Lord one thousand, nine hundred and sixty-seven

---

STATE OF FLORIDA,

vs.

JOSEPH WALLER, JR.

In the Name and by the Authority of the State of Florida:

ALAN R. WILLIAMS, Prosecuting Attorney, for the County of Pinellas, prosecuting for the State of Florida, in said County, under oath, information makes that Joseph Waller, Jr. of the County of Pinellas and State of Florida on the twenty-ninth day of December in the year of our Lord, one thousand, nine hundred sixty-six, in the County and State aforesaid, did then and there wantonly, willfully, or maliciously, mar, deface, injure, or mutilate a mural, which was part of the contents of a public building, contrary to Section 822.03, Florida Statutes, and Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

ALAN R. WILLIAMS
Prosecuting Attorney,
Pinellas County, Florida

Information for Resisting Arrest Without Violence

[R-4]

IN THE CIVIL AND CRIMINAL COURT OF RECORD OF PINELLAS COUNTY, FLORIDA

JANUARY TERM, in the year of our Lord one thousand, nine hundred and sixty-seven

STATE OF FLORIDA,

vs.

JOSEPH WALLER, JR.

In the Name and by the Authority of the State of Florida:

ALAN R. WILLIAMS, Prosecuting Attorney, for the County of Pinellas, prosecuting for the State of Florida, in said County, under oath, information makes that Joseph Waller, Jr. of the County of Pinellas and State of Florida on the twenty-ninth day of December in the year of our Lord, one thousand, nine hundred sixty-six, in the County and State aforesaid, did obstruct or oppose Sgt. Les Hoffman, St. Petersburg Police Department, while in the lawful execution of a legal duty, which consisted of arresting Joseph Waller, Jr. for malicious destruction of public property, contrary to Section 843.02, Florida Statutes, and Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

ALAN R. WILLIAMS
Prosecuting Attorney,
Pinellas County, Florida

Complaint and Judgment on Charge of Destruction of City Property

DATE OF VIOLATION: / / TIME OF VIOLATION:

NAME: Joseph [illegible] WALKER JR. [R-5]

RESIDENCE: 2430 - HARRINGTON AVE 30

PLACE EMPLOYED:

OCCUPATION: D.O.B. 10-4-41 RACE N SEX M

CH/OP NO. STATE YEAR

VEH. LIC. NO. STATE YEAR

MAKE BODY TYPE YEAR COLOR

DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE WITHIN THIS MUNICIPALITY.

NAMELY AT: 005 53rd 2 Ave N

NAME

SPEEDING M.P.H. IN M.P.H. ZONE ☐ FROM WRONG LANE

IMPROPER LEFT TURN ☐ NO SIGNAL ☐ CUT CORNER ☐ PROHIBITED

IMPROPER RIGHT TURN ☐ NO SIGNAL ☐ INTO WRONG LANE ☐ PROHIBITED ☐ FROM WRONG LANE

TRAFFIC SIGNAL VIOLATION (INNER LIGHT TURNED RED) ☐ PASSED MIDDLE INTERSECTION ☐ MIDDLE OF INTERSECTION ☐ NOT REACHED INTERSECTION

STOP SIGN VIOLATION ☐ WRONG PLACE ☐ WALK SPEED ☐ FASTER

IMPROPER PASSING AND LANE USAGE ☐ AT INTERSECTION ☐ CUT IN ☐ WRONG SIDE OF PAVEMENT ☐ BETWEEN TRAFFIC ☐ ON RIGHT ☐ ON GRADE ☐ LANE STRADDLING ☐ WRONG LANE ☐ ON CURVE

FAILURE TO YIELD RIGHT OF WAY ☐ FROM PRIVATE DRIVE ☐ FROM STOP / YIELD SIGN ☐ WHEN TURNING LEFT

OTHER Destruction of City Property

IN VIOLATION OF 25.14 (CITY ORD. / STATE STAT.)

SLIPPERY PAVEMENT ☐ WET ☐ RAIN ☐ SNOW ☐ ICE

DARKNESS ☐ RAIN ☐ UNLIGHTED CROSS ☐ ONCOMING

OTHER TRAFFIC PRESENT ☐ PEDESTRIAN ☐ SAME DIRECTION

CAUSED PERSON TO DODGE ☐ DRIVER ☐ PEDESTRIAN

JUST MISSED ACCIDENT BY APPROX. FT.

	PD	PI	FATAL
	☐	☐	☐

☐ PED ☐ VEHICLE ☐ HIT FIXED OBJECT ☐ RIGHT ANGLE ☐ HEAD ON ☐ SIDE SWIPE ☐ REAR END ☐ RAN OFF ROADWAY ☐ INTERSECTION

HIGHWAY TYPE: ☐ 2 LANE ☐ 3 LANE ☐ 4 LANE ☐ 4 LANE DIVIDED

AREA ☐ RURAL ☐ RESIDENTIAL ☐ SCHOOL ☐ BUSINESS

THE UNDERSIGNED FURTHER STATES THAT HE HAS JUST AND REASONABLE GROUNDS TO BELIEVE, AND DOES BELIEVE, THAT THE PERSON NAMED ABOVE COMMITTED THE OFFENSE HEREIN SET FORTH, CONTRARY TO LAW. SWORN TO AND SUBSCRIBED BEFORE ME

PR NO. 6690

THIS 29 DAY OF Dec 19 66 [illegible] Pauco

(SIGNATURE OF OFFICER OR COMPLAINANT)

(NOTARY PUBLIC) (ADDRESS OF COMPLAINANT)

COURT APPEARANCE 5 DAY OF JAN 19 67 AT 9:00 M

I HEREBY AFFIX MY SIGNATURE WITH THE UNDERSTANDING THAT SUCH IS NOT A PLEA OF GUILTY, BUT TO CERTIFY THAT I HAVE RECEIVED A SUMMONS COPY OF THIS CITATION AND AGREE TO APPEAR AT THE TIME AND PLACE INDICATED.

SIGNATURE:

A 91203

1/16

BAIL POSTED $ [illegible]

POSTED BY: [illegible]

BAIL TAKEN BY: [illegible]

FINE IN THE AMOUNT OF $ _____
RECEIVED AS REQUIRED BY COURT SCHEDULE:

_____ CLERK

200

BOND FORFEITED BY: _____

JAN 5 1967

CONTINUED TO: [illegible] REASON: [illegible]

CONTINUED TO: 1-30 REASON: _____

CONTINUED TO: _____ REASON: _____

ARRAIGNMENT, JUDGMENT, SENTENCE AND ORDER

SAID DEFENDANT WAS ARRAIGNED FOR TRIAL ON JAN 30 1967
AND ENTERED A PLEA OF not GUILTY TO THE CHARGE AS SET FORTH HEREIN.

AFTER HEARING THE EVIDENCE AND DULY CONSIDERING THE SAME, THE COURT FINDS YOU, THE DEFENDANT, _____ GUILTY OF SAID CHARGE; AND IT IS ORDERED AND ADJUDGED THAT YOU, THE DEFENDANT, ARE _____ GUILTY AS CHARGED OF SAID OFFENSE, AS SET FORTH HEREIN.

IT IS, THEREFORE, THE JUDGMENT, ORDER AND SENTENCE OF THE COURT THAT YOU, THE DEFENDANT, BE:

FINED $ _____

JAILED FOR 90 DAYS

IN THE CITY JAIL AT ST. PETERSBURG, FLORIDA

_____ SUSPENDED CONDITION _____

ATTEND _____ TRAFFIC SCHOOL SESSIONS

DRIVERS LICENSE REVOKED _____ MONTHS

NUMBER OF PENALTY POINTS ASSESSED _____

DONE, ORDERED AND ADJUDGED IN OPEN COURT AT ST. PETERSBURG, FLA.

ON JAN 30 1967 JUDGE HENRY ESTEVE

ATTORNEY [illegible] PHONE _____

APPEAL BOND OF $ _____

10a

Complaint and Judgment on Charge of Disorderly Breach of the Peace

[R-6]

DATE OF VIOLATION: 11-11 TIME OF VIOLATION: 12:15

NAME: Joseph Nmi Clarke

RESIDENCE: 2450 - Washington Ave

PLACE EMPLOYED:

OCCUPATION: D.O.B. 10-7-41 RACE N SEX M

CH/OP NO. STATE YEAR

VEH. LIC. NO. STATE YEAR

MAKE BODY TYPE YEAR COLOR

DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE WITHIN THIS MUNICIPALITY

NAMELY AT: 2 Block Goodbik Central Ave

NAME

SPEEDING M.P.H. IN M.P.H. ZONE ☐ FROM WRONG LANE

IMPROPER LEFT TURN ☐ NO SIGNAL ☐ CUT CORNER ☐ PROHIBITED

IMPROPER RIGHT TURN ☐ NO SIGNAL ☐ INTO WRONG LANE ☐ PROHIBITED ☐ FROM WRONG LANE

TRAFFIC SIGNAL VIOLATION (WHEN LIGHT TURNED RED) ☐ PASSED MIDDLE INTERSECTION ☐ MIDDLE OF INTERSECTION ☐ NOT REACHED INTERSECTION

STOP SIGN VIOLATION ☐ WRONG PLACE ☐ WALK SPEED ☐ FASTER

IMPROPER PASSING AND LANE USAGE ☐ AT INTERSECTION ☐ CUT IN ☐ WRONG SIDE OF PAVEMENT ☐ BETWEEN TRAFFIC ☐ ON RIGHT ☐ ON GRADE ☐ LANE STRADDLING ☐ WRONG LANE ☐ ON CURVE

FAILURE TO YIELD RIGHT OF WAY ☐ FROM PRIVATE DRIVE ☐ FROM STOP/YIELD SIGN ☐ WHEN TURNING LEFT

OTHER Disorderly Breach of Peace

IN VIOLATION OF 25.19 ☐ ORD. ☐ STATE STAT.

SLIPPERY PAVEMENT ☐ WET ☐ RAIN ☐ NIGHT

DARKNESS ☐ FOG ☐ RAIN ☐ UNLIGHTED ☐ CROSS

OTHER TRAFFIC PRESENT ☐ ONCOMING ☐ PEDESTRIAN ☐ SAME DIRECTION

CAUSED PERSON TO DODGE ☐ DRIVER ☐ PEDESTRIAN

JUST MISSED ACCIDENT BY APPROX. ☐ FT. ☐ IN. ☐ OTHER

PD ☐ PI ☐ FATAL ☐

☐ PED ☐ VEHICLE ☐ HIT FIXED OBJECT ☐ RIGHT ANGLE ☐ HEAD ON ☐ REAR END ☐ OVERTURN ☐ OFF ROADWAY ☐ INTERSECTION

HIGHWAY TYPE: ☐ 2 LANE ☐ 3 LANE ☐ 4 LANE ☐ 4 LANE DIVIDED

AREA: ☐ RURAL ☐ RESIDENTIAL ☐ SCHOOL ☐ INDUSTRIAL ☐ BUSINESS

THE UNDERSIGNED FURTHER STATES THAT HE HAS JUST AND REASONABLE GROUNDS TO BELIEVE, AND DOES BELIEVE, THAT THE PERSON NAMED ABOVE COMMITTED THE OFFENSE HEREIN SET FORTH, CONTRARY TO LAW. SWORN TO AND SUBSCRIBED BEFORE ME

PR NO. 6696

THIS 29 DAY OF Dec 19 66

(SIGNATURE OF OFFICER OR COMPLAINANT)

(NOTARY PUBLIC)

(ADDRESS OF COMPLAINANT)

COURT APPEARANCE 5 DAY OF JAN 19 67 AT 9 A M.

I HEREBY AFFIX MY SIGNATURE WITH THE UNDERSTANDING THAT SUCH IS NOT A PLEA GUILTY, BUT TO CERTIFY THAT I HAVE RECEIVED A SUMMONS COPY OF THIS TION AND AGREE TO APPEAR AT THE TIME AND PLACE INDICATED.

A-91304

State of Florida vs. Fairman

1/16

BAIL POSTED $ 300

POSTED BY: C Pierce

BAIL TAKEN BY: Riley

FINE IN THE AMOUNT OF $ _____
RECEIVED AS REQUIRED BY COURT SCHEDULE:

_____ CLERK

300
BOND FORFEITED BY: _____

JAN 5 1967

CONTINUED TO: 1-30-67 REASON: Capias

CONTINUED TO: _____ REASON: _____

CONTINUED TO: 1130 AM REASON: _____

JAN 30 1967

ARRAIGNMENT, JUDGMENT, SENTENCE AND ORDER

— SAID DEFENDANT WAS ARRAIGNED FOR TRIAL ON _____
AND ENTERED A PLEA OF NOT GUILTY TO THE CHARGE AS SET FORTH HEREIN.

AFTER HEARING THE EVIDENCE AND DULY CONSIDERING THE SAME, THE COURT FINDS YOU, THE DEFENDANT, _____ GUILTY OF SAID CHARGE; AND IT IS ORDERED AND ADJUDGED THAT YOU, THE DEFENDANT, ARE _____ GUILTY AS CHARGED OF SAID OFFENSE AS SET FORTH HEREIN.

IT IS, THEREFORE, THE JUDGMENT, ORDER AND SENTENCE OF THE COURT THAT YOU, THE DEFENDANT, BE:

FINED $ _____

JAILED FOR 90 DAYS

IN THE CITY JAIL AT ST. PETERSBURG, FLORIDA

_____ SUSPENDED CONDITION _____

ATTEND _____ TRAFFIC SCHOOL SESSIONS

DRIVERS LICENSE REVOKED _____ MONTHS

NUMBER OF PENALTY POINTS ASSESSED _____

DONE, ORDERED AND ADJUDGED IN OPEN COURT AT ST. PETERSBURG, FLA.

IN JAN 30 1967.

JUDGE HENRY

ATTORNEY _____ PHONE _____

APPEAL BOND OF $ _____

25.14 Destroying, Etc., of Public Property.

It shall be unlawful for any person maliciously or willfully to destroy, mutilate, injure or deface any of the public buildings, grounds, signs, sidewalks, electric lights, electric light poles or other property of the city.

It shall be unlawful for any officer or employee of any municipal department, or any other person, to destroy, injure, remove or disturb any bench, mark or monument in any street or public place in the city without first procuring a permit from the city manager. (Code 1955, ch. 25, § 12.)

[As to malicious injury to buildings and structures, see Florida Statutes, 1961, §§ 822.01 to 822.23. For state law as to trespass and injuring real property, see Florida Statutes, 1961, §§ 821.01 to 821.37.]

25.15 Disorderly Conduct.

Any person who shall make, aid, countenance or assist in making any improper noise, disturbance or breach of the peace or diversion tending to a breach of the peace; any person found in a disorderly house, house of ill fame or gaming house; any person who shall engage in or aid or abet in any fight, quarrel or other disturbance; any person who stands, loiters or strolls about in any place in the city waiting or seeking to obtain money or other valuable thing from others by trick or fraud or who aids or assists therein; any person who shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in the city or who shall aid or abet or in any manner be concerned therein; any person who shall window peep; or any person who shall engage in any indecent or obscene conduct in any public place shall be deemed guilty of disorderly conduct, and it shall be unlawful for any person to commit disorderly conduct. (Code 1955, ch. 25, § 13.)

[For authority to punish disorderly conduct, see Char., § 3, subsec. (o).]

Motion to Quash Information

IN THE CIRCUIT COURT FOR THE
SIXTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PINELLAS COUNTY

Fall term, 1966, Docket No. 16,743 Ct. Cr.

STATE OF FLORIDA

vs.

JOSEPH WALLER

Comes now the defendant JOSEPH WALLER, by and through his undersigned attorney, and respectfully moves that this Court quash the information filed on January 18, 1967 by the Honorable Clair A. Davis, State Attorney, in which the defendant Joseph Waller, together with other persons, was charged with Grand Larceny.

In support of this motion to quash the information, there is attached hereto an affidavit sworn by the defendant Joseph Waller, stating that he was tried in the Municipal Court of the City of St. Petersburg on January 30, 1967 and that, to the best of his knowledge and belief, the identical conduct alleged in the prosecution in that Court is now the sole basis of the allegations of the information above-mentioned filed on January 18, 1967 in this Court.

And the defendant Joseph Waller, by and through his undersigned attorney, respectfully asserts that the City of St. Petersburg, Florida is a subdivision of the State of

Florida; that the Municipal Court of that city partakes of the judicial power of the State of Florida, and that, for the purposes of applying the bar against double jeopardy, the trial of defendant in the Municipal Court of the City of St. Petersburg was a trial in a court of the State of Florida.

Since the defendant Joseph Waller has already been tried by the Municipal Court of the City of St. Petersburg on charges arising out of the conduct described in his affidavit attached, the State of Florida is barred from bringing him to trial again by reason of the same conduct, through the provisions against double jeopardy of the Constitution of the State of Florida, and through the Fourteenth Amendment of the Constitution of the United States.

JOHN D. DUE, JR.
Attorney for Joseph Waller

Affidavit of Joseph Waller

JOSEPH WALLER, being first duly sworn, deposes and says:

1. I am presently imprisoned in the City Jail at St. Petersburg, Florida as a result of sentences imposed upon me by the Municipal Court of the City of St. Petersburg on January 30, 1967 at a trial at which I was personally present.

2. At the trial, the prosecution alleged that on December 29, 1966 I had been a member of a group of persons who allegedly removed a mural from a wall of the St. Petersburg City Hall and carried it through the streets of the city until it was recovered by police during a scuffle in which the mural was damaged. I pled not guilty.

3. After hearing the evidence introduced by the prosecution in support of the above allegations, the Municipal Court found me guilty on the two charges of Destruction of city property and Disorderly breach of the peace, and sentenced me to be jailed for 90 days on each charge.

4. I am one of the persons accused in the Direct Information for Grand Larceny filed by Clair A. Davis, State Attorney on January 18, 1967 in the Circuit Court in and for Pinellas County, docket No. 16,743 Ct. Cr. I have pled not guilty. Trial has not yet taken place.

5. I am the person accused in each of the following three Direct Informations filed by Alan R. Williams, Prosecuting Attorney on February 13, 1967 in the Criminal Court of Record of Pinellas County: docket No. 7458 (unlawful assembly); docket No. 7460 (malicious destruction of public property); and docket No. 7494 (resisting arrest with-

out violence). I have pled not guilty to all of these charges. Trial has not yet taken place.

6. To the best of my knowledge and belief, the Direct Information for Grand Larceny mentioned in paragraph No. 4 above is based solely upon allegations that I engaged in the identical conduct alleged in the prosecution in the Municipal Court on January 30, 1967 mentioned in paragraph No. 2 above.

7. To the best of my knowledge and belief, the three Direct Informations for unlawful assembly, malicious destruction of public property and resisting arrest without violence mentioned in paragraph No. 5 above are also based solely upon allegations that I engaged in the identical conduct alleged in the prosecution in the Municipal Court on January 30, 1967 mentioned in paragraph No. 2 above.

8. I have personal knowledge of the matters presented in the first five paragraphs of this affidavit. The matters in paragraphs No. 6 and 7 are to the best of my knowledge and belief.

JOSEPH WALLER

(Sworn to April 24, 1967.)

Motion to Quash

[R-85]

IN THE CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR PINELLAS COUNTY

No. 16743

STATE OF FLORIDA

vs.

JOSEPH WALLER, JR.

GRAND LARCENY

The foregoing cause coming on this day to be heard upon Motion To Quash filed this 25th day of April, 1967 and the same having been argued by counsel for the respective parties and duly considered by the court, it is ordered that said Motion To Quash be and the same is hereby denied.

Done and ordered at Chambers this 25th day of April, A. D. 1967.

CHARLES H. PHILLIPS, JR.
Circuit Judge

Excerpts From Testimony by Lynn Andrews, Called by the State, on Cross-Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—18—

• • • • •

Q. I see, and how long have you been with the City? A. Since 1961.

Q. '61, and since your first coming with the City of St. Petersburg has this been continuously on the wall? A. Yes, sir.

Q. Or mounted on the wall? A. Yes, sir, with the exception of one small corner.

Q. Which was re-glued. A. No, sir. It was the one that was lifted up a few days before it was taken off the wall.

Q. Oh, was there a corner lifted up? A. Yes, sir.

Q. Oh, I didn't know about that. A. Yes, sir.

Q. How much of a corner, do you know? A. About four inches each way.

Q. Do you know, at the bottom or— A. At the bottom right-hand corner.

Q. Just the one corner. Would that be this corner over here? A. This is correct.

—19—

Q. Mm, hmm, and the glueing process, was that this corner? A. No, it was all over it.

Q. All over it? A. Yes, sir.

Q. I notice there are horizontal lines here. Do you know how those lines got on there? A. Those I couldn't say how they got on there.

Q. Mm, hmm. As a matter of fact, as far as any of these markings on here, I assume you know nothing about how they got there? A. That would be hearsay.

Q. You mentioned something—excuse me—based upon your previous knowledge of having seen this mural, can you now look at it and see if there is any tearing or cutting of—either with a knife or by hand? Are there any tears in here that are different than what you saw on the wall? A. The—as I pointed out, the difference that I see in this particular painting is—from when it was on the wall the 29th or thereabouts, is the yellowish or white areas scattered throughout the painting that appears to me to be the results of paint being rubbed off, knocked off, or in some manner taken off the painting. As I pointed out, the lower

—20—

right-hand corner, that that little white area was there on the 29th, about four inches square there, about four inches by four inches.

Q. This? A. No, sir, further down.

Q. This was like this? A. Just about four inches, sir. That's just about where the fold is, yes, sir.

Q. Just about here? A. Yes, sir, it was done a few days in advance of the painting being taken off, by some of the same defendants.

Q. Beg your pardon? A. This was done by some of the same defendants a few days prior to the painting being taken off the wall.

Mr. Davis: Your Honor, I move that that testimony be stricken on the basis that his prior testimony was to the effect that he had no knowledge as to who took it off.

Mr. Allweiss: I think he's testifying who lifted it off a few days before, Judge.

The Witness: I only testified to the corner being

lifted a few days before. This was by some of these same defendants, yes, sir.

The Court: And you were present then?

A. I was present, ran right by me.

Q. On this particular thing, did you see the person lifting the flap? A. This fellow right here, the second one over.

Mr. Allweiss: Ask that the record reflect the witness has indicated the defendant Waller.

The Court: Let the record so reflect, and objection is overruled.

Q. And somebody else? A. Yes, I don't recognize the other one.

Q. I see. Now, you said they ran by you. A. Yes, sir.

Q. Where were you? A. I was on the first floor.

Q. Whereabouts on the first floor? A. I was just about the corner of the steps, just about where the steps go up to the second floor.

Q. I see. Who was with you? A. Don't recall.

Q. Were you by yourself? A. Well, I obviously don't recall if I was by myself or someone was with me.

Q. Mm hmm, were you about to go upstairs? A. I believe so. I believe this is the way that I was headed at that time.

Q. And you say a couple people ran by you? A. Yes, sir.

* * * * *

Excerpts From Testimony by Phillip Hamilton, Called by the State, on Direct and on Cross-Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—69—

* * * * *

PHILLIP HAMILTON, a witness herein, being first duly sworn, testified in behalf of the State as follows:

Direct Examination by Mr. Allweiss:

Q. State your name, please, sir. A. Phillip L. Hamilton.

Q. What is your occupation? A. I work with the City Engineering Department.

Q. And where is your place of employment? A. City Hall building, St. Petersburg.

Q. Did you have occasion to be present on December

—70—

the 29th, 1966, approximately noon hour? A. Right.

Q. Do you know a Joseph Wall? A. Yes, sir.

Q. Is he in the courtroom today? A. Yes, he is.

Q. Would you point him out? A. Right there.

Mr. Jagger: Let the record show the—

The Witness: Which one, Joseph Walls?

Q. Joseph Walls. A. He's right here.

Q. Would you go over and put your hand on his shoulder so that we know who you are talking about? A. This one.

Q. All right, while you are there, do you know a Joseph Waller, Jr.? A. Yes, I do.

Q. Would you point him out? A. Right here.

Q. I would ask that the record reflect that the witness has indicated the defendants Joseph Wall and Joseph Waller, Jr.

The Court: Let the record so reflect.

Q. Is that the reason you were confused is because the names sound a little bit— A. Yes, I—

—71—

Q. Did you have occasion on the 29th day of December 1966 to see both of them in the City Hall? A. Yes, I did.

Q. Would you tell us what time approximately it was that you saw them? A. Approximately at twelve o'clock.

Q. Is that in the afternoon or morning? A. That was in the afternoon.

Q. All right, would you tell us what, if anything, you saw them doing and where it was that you were stationed when you saw them doing this thing you might have seen them do? A. I was at the top of the second floor about to descend the stair, and on the landing between the first and second floors I noticed this gentleman over here.

Q. Name him by name. A. Joseph Walls.

Q. Okay. A. Standing on the landing and leaning against the railing at the landing in front of the mural.

Q. All right, go ahead. A. At this time I turned my back, walked approximately thirty-five–forty feet down the hall, and I heard this tremendous ripping and tearing sound. I ran back to the top of the stairs, down the stairs, just in time to see the two defendants which I pointed out

—72—

descending the bottom step or the first landing with the mural between them.

Q. You talking about Waller and Walls? A. Waller and Walls.

Q. I show you—take a look at that State's Exhibit No. 1 for identification. Have you seen that before? A. Yes, sir, that was on the wall between the first and second floor. It was the St. Petersburg City Hall.

Q. Was that the thing they tore down? A. Yes, it is.

Q. Was it in that condition when they tore it? A. No, sir, it looked in good condition.

Q. Were there any cracks with some stuff in it like it's on there now? A. Not noticeable.

Q. And what did they do with the painting after they tore it down?

Mr. Davis: I object to that question, your Honor. There's no testimony or evidence that they did tear it down. As I understand the testimony, the witness was forty feet down the hall and heard a noise but did not see anybody tearing the mural down.

The Court: Objection's overruled. Your objection has no relevance to the question as I heard it.

—73—

Q. What did you see them do with it afterwards? A. They descended the stairs onto the first floor, ran down the hall and out the front door of the building.

Q. Now, while they were doing that can you tell me how they were treating this thing, how they were carrying it, if you know? A. They had the mural by the bottom two corners.

Q. Get down here and show us, Mr. Hamilton. A. They had the mural by these two corners down here and was running out the hall carrying one on this corner and one on that corner, and this portion of the mural was dragging on the floor.

Q. And they ran out the front door, right? A. Yes, sir.

Mr. Allweiss: Okay. Excuse me one second, Judge.

You may inquire.

Cross Examination by Mr. Jagger:

Q. Did you hear anybody say anything? Was there any conversation throughout all this? A. I didn't hear anything in the building, no.

Q. Mm, hmm. I believe it was correct that you—you say you saw Joseph Wall leaning on a railing, was that correct? A. Right.

Q. And where was he? A. He was on the landing be-

—74—

tween the first and second floor at the foot of the mural.

Q. Well, for some of the jurors who may not know you go up the stairs, that's a middle landing to get to the second floor? A. Right, mm, hmm.

Q. And you are talking about the landing between the first and second floor? A. Right.

Q. And he was just standing there, just leaning there? A. He was leaning on the railing. He had one hand and one arm on the railing.

Q. Was he by himself? A. Yes, sir.

Q. And this is when, when you were walking back to your office, when you walked down back to your office? A. I wasn't going back to my office. I was going just back down the hall. There was another gentleman standing there.

Q. Incidentally, did you, do you know, or have you ever seen Joseph Wall or Joseph Waller before that day? A. I had seen Mr. Waller in the building a couple times previous to that. I didn't know his name or anything at that time.

Q. I see. So when you say you saw Joseph Wall, that

—75—

was the first time you had seen him? A. That was the first time I had seen him.

Q. Yes. So you, as far as you walking over and identifying him— A. I saw him.

Q. —you have seen him— A. Mm, hmm.

Q. —and had occasion to look at photographs? A. I have seen him at the police station. I seen him while the group was parading down Central Avenue and 5th Street.

Q. Did you follow? A. Yes, sir.

Q. Mm, hmm. Now, when you walked away you say you heard some—how do you describe it—a noise? A. A tremendous noise. Apparently this picture was glued to the to the wall, and as it came loose the tearing of glue, paper, away from the wall made a tremendous sound. The halls echo quite a bit.

Q. Mm, hmm. A. And this was an awfully loud noise.

Q. Was a long continuous noise, would you say, or—as opposed to, you know— A. No, it wasn't an exceptionally short noise, but neither was it long. It was, oh, about as long as it would take to tear a piece of paper like

this, although in that distribution of time, in seconds, I can't place it.

Q. Mm, hmm, and this is when you ran back to what, the stairway? A. I—to the end of the hall. The stairway is in the center of the bottom and hallways go each way, and I went back along the hall, which would be to the north, in the north hallway.

Q. The north stairway you mean? A. I went down the hallway north from the stairs.

Q. I see. Then did you come back? A. Then I ran back and downstairs.

Q. Downstairs? A. Right.

Q. Did you stop at the top of the stairs and look down? A. I had my head down like this looking, you know.

There's a little balcony up here, and I had my head down, was looking under at the time I descended the stairs.

Q. And this is how you could see two people carrying this mural out? A. Right.

Q. Mm, hmm, was the face up? Was it just like this with two people on either corner? You said part was—it was dragging here? A. I was looking at the gentlemen at

the time. I was trying to place the faces in my mind. I don't remember if the painting was right side up or upside down.

Q. You don't recall the face of this painting? A. Not at that time. I—I would guess that it was face up.

Q. Mm, hmm. You don't recall whether it was in a different condition than it is now? A. It wasn't—I'm sure it wasn't this badly damaged at that time. It couldn't have been.

Q. You are sure it was not? A. I'm positive of that.

Q. Would it be your testimony that since that date, since it came off the wall, that someone else has—that this got damaged some other—through some other means from the time you saw it? A. I would say that it was damaged within the preceding fifteen or twenty minutes to the great extent that it is now.

Q. Mm, hmm. Did you have occasion to see any of these, see these horizontal lines coming across here and one line all down the middle? I assume that's from a fold. A. This is—

Q. But I don't know. A. This is really the first time I've had a chance to look at that painting. Mind if I stand up and look at it?

—78—

Q. Yes, sir, take a look at it. I'm interested in whether you saw these fold marks at any particular time before. A. No, I haven't, fold marks. I don't think the fold marks were there.

Q. All right sir, you say you ran down the stairs and went out the door? A. That's right.

Q. Did you see some policemen there? A. No, I didn't, not immediately.

Q. See any policemen in the building? A. None in the building, no.

Q. You didn't see some right outside on the stairs? A. There was none on the stairway, no, not in uniform.

Q. You don't know Detective Homer Allen? A. I do now.

Q. You do now. You don't know whether he was there then? A. No, I did not.

Q. Mm, hmm. Incidentally, none of this was connected with your job there in City Hall? A. No.

Q. You weren't placed there to be watching anybody? A. No, I am with the Engineering Department. It was noon and I was on my way to lunch.

—79—

Q. Mm, hmm. I'm—there's one other thing: Did you see Mr. Wall or Mr. Waller take out a knife and try to cut this in any way or take out a match or cigarette lighter and try to burn this, or did anyone, you know, do anything in your presence to destroy this mural or cut it? A. Not while they were in the building, and immediately after leaving the building, they joined a large crowd, and I couldn't see what happened down there at this time.

Q. But in your presence you saw no one try to cut this mural up or burn it? A. No, I—

Q. Did you hear anybody, any conversation? A. There was considerable yelling and—out front, and what they were going to do with the picture.

Q. What was this? A. They were going to parade it around. They had it, they got it, "Now we got it. We are going to take it to colored town," or something.

Q. Take it to the black community? A. Something of that nature, yes.

Q. Was there—in all that conversation you heard, did you hear anyone say that they were going to cut it up or burn it or destroy it in any way? A. I did not hear them say they were going to, no.

Mr. Jagger: All right, thank you.

Cross Examination by Mr. Davis:

Q. If I may, just one question: I believe you testified that when you saw these two gentlemen running out the building dragging this behind them, is that correct? A. Yes, sir.

Q. They were holding it by the bottom two corners, is that your testimony? A. Right.

Q. It just bothered me, and I hope you can straighten this out for me: If you didn't know they were carrying it right side up or upside down, how did you know that they were carrying it by the bottom two corners? A. Because of the size of the picture. They couldn't have gotten hold of the top corners.

Q. This was just an assumption they were carrying it by the bottom? A. Right.

Q. The same as you assume they tore it off the wall, because you did not see them do that, either? A. That's right, sir.

Mr. Davis: All right, sir.

Cross Examination by Mr. Peterman:

Q. Mr. Hamilton, did I understand you to say that this

is the first time that you have seen this painting since that day? A. The first time I have seen it opened up. It's been —I've seen it in paper a couple of times. I don't believe I have seen it unfolded.

Q. Were you a witness— A. Sir, I have to beg your pardon. I did see that painting.

Q. Thank you. A. Right in City Court.

Q. So you have seen it again? A. Yes, sir, City Court. It wasn't on display like it is now.

Q. Yes. Okay. Now when they carried this painting out, you can't remember whether it was right side up or— A. It seems to me it was right side up, but like I say, I was looking at the faces and features and clothing of the people. I was trying to place their—them in my mind as the people who had it.

Q. Now you stated that after you saw them you ran down the north hall and then you came back, is that correct? A. That's right.

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Excerpt From Testimony by Phillip Hamilton, Called by the State, on Recross Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—96—

* * * * *

Q. Now, at any time did you recognize John Bryant with his hand on the painting? A. No, sir, like I said before, I can't tell which ones had their hands on the painting, which ones didn't. If I may say, it's like going to a football game with the eleven players on the field, you can't tell after the game that all of them had not handled the football.

Q. How do you recognize that John Bryant was with the group? A. I was trying to place faces, trying to place faces and picture them in my mind.

Q. Have you viewed any pictures since this as to identification? A. Yes.

Q. Where did you view these pictures? A. At the last court case in St. Petersburg.

Q. Did you at the time of the court case in St. Petersburg, did you make the statement that you assume that all of the defendants were together because they were Negroes?

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Excerpt From Testimony of Marjorie Buswell, Called by the State, on Direct and on Cross-Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—102—

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MARJORIE BUSWELL, a witness herein, being first duly sworn, testified in behalf of the State as follows:

Direct Examination by Mr. Allweiss:

Q. State your name, please, ma'am. A. Marjorie Buswell.

Q. And what is your occupation? A. Clerk 2 at City Hall.

Q. Where, what City Hall is that? A. In St. Petersburg.

—103—

Q. Is that in the City of St. Petersburg, Pinellas County, Florida? A. Yes, sir.

Q. Were you so employed on December the 29th, 1966? A. Yes, sir.

Q. Did you have occasion to observe any incident in City Hall on the—approximately noon-time on the 29th day of December 1966? A. Yes, sir.

Q. Would you tell us what, if anything, you observed at that time? A. I had just gotten off the elevator coming up from the basement, and I saw two men run up from the front door up through the steps leading up to the second floor landing.

Q. Are these two men in the courtroom today? A. Yes, sir.

Q. Would you point them out, please? A. Mr. Waller and Mr. Walls over there with the red sweater.

Q. Would you point out each one, please, ma'am, so I know who you are indicating. You can indicate by color of the clothes or something like— A. Mr. Waller has the brown suit with the light tan shirt, and Mr. Walls has the red sweater on, Mr. Walls.

Mr. Allweiss: If the Court please, I would ask

that the record reflect that the witness has indicated the specific defendants Joseph Waller, Jr. and Joseph Wall.

The Court: Let the record so reflect.

Q. In that regard, Mrs. Buswell, what, if anything, did you see them do? A. Well, I walked over to the steps, and they were standing up by the painting, and they had their hands on the two lower corners, so I spoke to them, and they looked down at me.

Q. What, if anything, did you say to them? A. Well, first I said, "Leave that alone," and they looked down, and they went on with what they were doing.

Q. What were they doing? A. Well, they were attempting to lift the corners, I believe.

Q. All right. A. And then finally I asked them to stop it, again, and with that, why, there was a big noise, and they just jerked it right off.

Q. All right, and then what did they do, if anything? A. Well, then they were rather in a hurry, and they each had a piece of it, and ran down the steps and outside.

Q. With what? A. The painting.

Q. All right, I would ask you to step down and take a

—105—

look at State's Exhibit No. 1 for identification. Would you do that, please, ma'am?

Can you recognize and identify that particular painting that's lying on the floor over there? A. Well, that's the mural.

Q. Is that the one they took down? A. Yes.

Q. Was it in that condition when they took it down, or before they took it down? A. Before they took it down it was not in that condition.

Q. In what condition was it before they took it down? A. Well, it was a complete painting with no crevices or mark on it at all.

Q. Okay. Resume your seat, please, ma'am.

How long have you worked at City Hall? A. Five years this July.

Q. Had occasion to see that painting most every day? A. Yes, sir.

Q. Now, what did they do when they were dragging it down? What did they do with it? Where did they go? A. They went right outside the building.

Q. Outside the front door? A. Yes.

Q. That was the last that you saw of them? A. Yes.

—106—

Mr. Allweiss: You may inquire.

Cross Examination by Mr. Jagger:

Q. Were you able to see the mural when they came by you? A. Yes, I noticed it. It's pretty big.

Q. Mm, hmm. Was the face up like it is now, or was it turned over? A. Well, if you take two men and try to carry something out that size, it was all crumpled up.

Q. What do you mean? A. Well, I mean they didn't take it out as a big—as it stands on the floor now. In other words, they naturally had to more or less crunch it together in order to get it—get it out of the building.

Q. They didn't— A. (Continuing) Like you would be more or less folding up a sheet or something if you were in a hurry.

Q. I see. It wasn't drug on the floor? A. Not at that time, no.

Q. I'm referring to the time coming down the stairs. A. Well, yes, down the stairs, but once they passed me on the floor level it was not on the floor at that particular time.

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Excerpt From Testimony of B. J. Atkins, Called by the State, on Direct Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—225—

* * * * *

dragging a large piece of canvas in the east crosswalk of Eighth Street. They were running. They would run for a few steps and then walk for a few steps and shake the canvas high in the air and yell. Then they would run for a while and jerk it back and forth and shake it up in the air, and having previous knowledge of previous reports of what had occurred, I made a right turn at Eighth Street, drove up to First Avenue South in front of the two, alighted from the cruiser. At that time one of the men had dropped the corner of the canvas, was running west. Joseph Waller still had the canvas in his hand, started running west. I gave chase, chased him across First Avenue and up to about fifty feet west of Eighth Street on First Avenue before I caught up to him.

Q. Is that the north or south side of St. Petersburg? A. That is on the south side, south of—one block south of Central Avenue.

Q. Is that near Webb's City? A. It is.

Q. Go ahead. A. Right on the corner. As I was chasing him, he was swinging the canvas back and forth, back and forth. As a matter of fact, one time I stepped on it as he threw it under my feet. As I caught up to him—I was running—right alongside the sidewalk there's a concrete wall about six feet high, and I got up to him. He wouldn't run

any further, so he would throw the canvas in between he and I, pull around, just throw it. I'd try to go around the canvas to get to him, and he'd re-throw the canvas back the other way to keep it between us, and he did this several times before I finally did get my hands on it, and I told him several times he was under arrest. I hollered at him.

Q. You placed him under arrest? A. Yes.

Q. Did you confiscate the canvas? A. Yeah, we took the canvas at that time.

Q. Would you come down here? Would you look at State's Exhibit No. 1 in evidence, and will you tell me whether this is the same canvas that you describe as being thrown and switched around and so forth? A. Yes, sir, that's the same canvas.

Q. You have placed your initials on it? A. I did with a small star-like mark above it.

Q. You took it down to the Police Station? A. At the time I carried the canvas back to Eighth Street and First Avenue South, folded it up, put it in the cruiser, and carried it to the station, marked it and turned it in to the evidence room.

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Excerpt From Testimony of B. J. Atkins, Called by the State, on Cross-Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

—238—

* * * * *

and then this way. One time like that, and then I folded it one more time across here like that, and that's the position that I put it in the back.

Q. Okay, let's take—let's take—let's take it apart again. A. Okay.

Q. Now, would you lift up that end?

Whoops. (State's Exhibit No. 1 slipping from counsel's grip.)

Okay, let it down now.

How many times did you to your own knowledge—has this painting been folded and unfolded? A. I know of one other time, at the preliminary hearing.

Q. You—we just folded it and unfolded it, did we not, you and I? A. Wait a minute, I take it back. The City Court trial. I believe—

Q. Yeah, that's right. A. I believe it was unfolded there, preliminary hearing and then that.

Q. Do you remember how it was mounted in the City Court trial? A. How it what?

Q. How it was mounted, how it was displayed? A. Yes, I believe it was hung over a blackboard easel.

Excerpt From Testimony of Homer G. Allen, Called by the State, on Direct Examination. (Court-reporter's transcript, Vol. II, pages 244-246, bound as Vol. III of transcript of record prepared by Clerk of Circuit Court.)

—244—

* * * * *

Q. You were in your car? A. Yes, sir.

Q. In what direction were they heading? A. They were heading northbound on Ninth Street.

Q. Northbound. All right, and then you lost sight of them? A. Yes, sir.

Q. And where did you go after that? A. I went to the station. I saw Lieutenant Atkins and Captain Smith.

Q. Don't tell us what conversation you had. What did you do after you arrived at the police station? A. I went back into the detective bureau. I was working on some other case.

Q. Did you go anywhere after that? A. Yes, sir.

Q. Where was that? A. I was sent down to the City Hall to observe what was taking place.

Q. What, if anything, did you see at City Hall with regard to these six defendants? A. I saw eight to ten col-

—245—

ored people on the steps, and they were chinning around there carrying signs, and then all of a sudden I observed Walls and Waller come out of the front door of City Hall with the mural.

Q. All right, are Walls and Waller in the courtroom? A. Yes, sir.

Q. Would you go out and point them out, please? A. Yes, sir.

Q. Wallers and Wall.

Ask that the record reflect that the defendant—the witness has indicated the defendants Waller and Wall.

The Court: Let the record so reflect.

Q. What did you see Waller and Wall doing? A. Joseph Waller was carrying the sign on the south side, which would be the south direction—

Q. I'm talking after they came out of City Hall, what did you see them— A. They were dragging the sign out, pulling the sign out. They were each holding it by the top corner and dragging it along.

Q. Did you say a sign? A. The mural.

Q. Is that mural in the courtroom today? A. Yes, sir, down there on the floor in front of me.

Q. You are indicating State's Exhibit No. 1 in evidence,

this thing right here? A. Yes, sir.

Q. All right, what were they doing right now? A. They were yelling and shouting, and as soon as they got to the foot of the steps onto the sidewalk, the other group got around them and they proceeded southbound on Fifth Street to the alley.

Q. Were those four defendants in that group? A. Sir?

Q. Were the other four defendants in the group, that are in the courtroom? A. Yes, sir.

Q. Will you step down here, Detective Allen?

I'd like for illustration purposes for you to describe these photographs. I show you State's Exhibit No. 3 in evidence. Would you turn it toward the jury and so all jurors can see—

It might be well if some of them gather around, Judge—

And tell them what this picture depicts? A. This is the mural.

Mr. Allweiss: Can each of you see that?

Juror No. 2: No, we cannot.

Mr. Jagger: If the Court please, I'm not sure; I think the pictures speak for themselves—photographs.

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Excerpt From Testimony of Defendant, Joseph Waller, Jr., on Redirect Examination, in *Florida* v. *Waller*, No. 16743, Circuit Court, Sixth Judicial Circuit

* * * * *

—421—

Redirect Examination by Mr. Due:

Q. Mr. Waller, is it a fact you have been punished already for the act of removing this mural? A. I'm sorry, I can't—

Mr. Mensh: Just a minute. I object to the question being outside the scope of anything covered by cross, your Honor.

The Court: Objection sustained on that and other grounds, and the jury's instructed to disregard the question.

Q. Do you know the difference between removing a mural and stealing a mural?

Mr. Mensh: If it please the Court, I'm going to object again. There's no presumption to the being on the wall.

Motion for New Trial

[R-128-129]

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

Ct. Cr. 16,743

STATE OF FLORIDA

VS.

JOHN WESLEY BRYANT; LEMUEL GREEN; CRAWFORD LOUIS JONES; JOSEPH WALLER, JR.; JOSEPH WALL; TOMMY WILLIAMS

COMES NOW the defendant, JOSEPH WALLER, by and through his undersigned attorney and files this his Motion for New Trial and as grounds therefore shows;

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the weight of the evidence.

4. That the Court erred in failing to direct a verdict at the close of the State's case and at the close of the defense case.

5. That the Court erred in failing to define and explain all of the elements constituting Grand Larceny.

6. That the Court erred by granting in part the State's requested instruction No. 1.

7. That the court erred in failing to give the instruction requested by defendant Joseph Wall, and adopted by Joseph Waller, said instruction No. 1, 2, and 3.

8. That the Court erred in failing to give defendant Joe Waller's requested instruction No. 1, 2, 4, 5, 6, 7, and 8.

9. That the Court erred in denial of the Defendant's motion to Quash.

10. That the Court erred in denial of Defendant's motion for a direct verdict.

11. That the Court erred in denial of Defendant's motion for a continuance.

12. That the Court erred in excessively interrupting Counsel for the Defendant in his examination and cross-examination of witnesses.

13. That the Court erred in limiting Counsel for the defendant in his direct examination of witnesses Talmadge Rutledge and Dr. Clark Bouman.

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By: JOHN D. DUE, JR.

Motion to Reconsider Sentence

[R-139-140]

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA IN AND FOR PINELLAS COUNTY

Ct. Cr. 16,743

STATE OF FLORIDA

vs.

JOSEPH WALLER, JR.

Comes now the defendant in the above-captioned matter and moves this Honorable Court to reconsider the said sentence, vacate, or modify, or correct the sentence of Joseph Waller, Jr., on the following grounds:

1. The determination of sentence is based upon insufficient evidence.
2. The Court erred in denying defendant's motion that the pre-sentence and sentencing be suspend.
3. The Court erred in denying defendant's motion that the pre-sentence investigation report be made part of the record.
4. The Court erred in passing a sentence on grounds and reasons which go "far afield."

5. The Court erred in passing a sentence on grounds and reason which are irrelevant, prejudicial and unfair.
6. The Court erred in passing a sentence on grounds which are dehors the records.
7. The Court erred in denying defendant's motion that a pre-sentence investigation be made which is accurate, fair, and prompt.
8. The Court erred in arbitrarily denying the right to probation.
9. The Court erred in denying consistent sentence to the defendant in relation to the co-defendant, Jody Wahl.
10. The Court erred in denying the defendant's motion and request for reasons and grounds for the sentence of Joseph Waller which would be expressed in terms of equality or individualization in relation to co-defendant Jody Wahl.

Wherefore, the defendant, Joseph Waller prays this Honorable Court to:

1. Reconsider the said sentence, and vacate, or modify, or correct the sentence of Joseph Waller.
2. Hold a special hearing immediately for the purpose of hearing and ruling on this motion within 2 days on the filing of this motion, or, in the alternative:
    1. Grant the motion requested
    2. Deny the motion requested

3. Recite that Counsel has requested the disposition of this motion within 2 days and that this request is denied.

FRANK PETERMAN (Attorney)
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JOHN D. DUE, JR. (Attorney)
540½ West Brevard Street
Tallahassee, Florida

CERTIFICATION (omitted in printing)

Motion to Vacate and Set Aside Judgment, Conviction and Sentence—Pursuant to Criminal Procedure Rule #1

[R-143-144]

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA IN AND FOR PINELLAS COUNTY

Ct. Cr. 16,743

STATE OF FLORIDA

vs.

JOSEPH WALLER

To the Honorable Judge of the Above Entitled Court:

Comes now the defendant in the above-captioned matter and moves this Honorable Court to void the sentence of Joseph Waller, and that the Court order the discharge of the defendant from custody or his release from custody upon nominal bail within three (3) days from the filing of this motion, in order to preserve any rights which may lie on behalf of the defendant under the State Corrective Process, on the grounds that the sentence and continuing custody of the defendant, Joseph Waller, is invalid, illegal, and unconstitutional, constituting denial of rights under the Declaration of Rights of the Florida Constitution, and due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution for the following reasons:

1. Those reasons and grounds stated in the Motion to Quash and Motion for a directed verdict and Motion for a new trial which are hereby incorporated and adopted.

2. That said sentence was passed without a pre-sentence investigation and therefore is invalid.

3. That said sentence was passed without a pre-sentence investigation which is true, prompt, or fair, and therefore is invalid.

4. That the grounds and reasons for the sentence go "far afield" are therefore without authority and are invalid.

5. That the grounds and reasons for the sentence are irrelevant, prejudicial, and unfair, and therefore without authority and are invalid.

6. That the grounds and reasons for the sentence are based on the pre-sentence report which the Court had ruled invalid and inadmissible on the grounds that it was unfair, and inaccurate, thereby denying the defendant right to assess, right to complaint, and to cross-examine the informants to and for the pre-sentence investigation report.

7. That the denial of probation was arbitrary in that there was no consideration to the pre-sentence and the desirability of probation in the light of the pre-sentence investigation report.

8. That the Court refused to give consistent sentences to defendant, Joe Waller co-defendant Jody Wahl, and to make no distinction between the defendant co-defendant, considering their background.

9. That the Court refused to place on the record the reasons for the sentence of defendant Joseph Waller in terms of equality or individualization, in relation to co-defendant, Jody Wahl.

WHEREFORE, the Defendant Joseph Waller prays this Honorable Court to:

1. Void the sentence passed on Joseph Waller.
2. Hold a special hearing immediately for the purpose of hearing and ruling on the motion to void within 2 days on the filing of this motion, or in the alternative:
    1. Grant the motion requested.
    2. Deny the motion requested or,
    3. Recite that Counsel has requested the disposition of this motion within 2 days and the request is denied.

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CERTIFICATION (omitted in printing)

Motion to Augment Record, and Order of Circuit Judge Denying Motion, December, 1967. [Included as part of item 2 of record of Supreme Court of Florida; individual pages are unnumbered.]

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA
IN AND FOR PINELLAS COUNTY

Cir. Ct. Cr. 16,743

STATE OF FLORIDA,

VS.

JOSEPH WALLER, JR., *et al.*

The Appellant JOSEPH WALLER, JR., respectfully shows unto the Court that the record on appeal has now been completed and fails to include the pre-sentence investigation report, although it was made clear to the Clerk that Appellant desired said pre-sentence investigation report to be included in the record as a predicate for arguing this appellant's assignment of error directed to the severity of the sentence.

WHEREFORE, appellant prays the Court to enter its Order directing the Clerk to augment the record on appeal by including therein the pre-sentence investigation report sub-

mitted to the Court in this cause before sentence was passed upon the appellant.

GARDNER W. BECKETT, JR.
Of Counsel for Appellant
Joseph Waller, Jr.

GARDNER W. BECKETT, JR.,
52 Sixth Street South,
St. Petersburg, Florida

LESLIE H. LEVINSON,
2925 N. W. 12th Place,
Gainesville, Florida 32601

Attorneys for Appellant

CERTIFICATE OF SERVICE (omitted in printing)

Order Denying Motion to Augment Record on Appeal

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA
IN AND FOR PINELLAS COUNTY

Cir. Ct. Cr. 16,743

STATE OF FLORIDA,

VS.

JOSEPH WALLER, JR., *et al.*

Upon consideration of the Appellant's Motion to Augment the Record on Appeal by including therein the presentence investigation report delivered to the Court prior to the sentencing of the appellant in this cause, it is

ORDERED that said Motion be and the same is hereby denied.

DONE AND ORDERED in Chambers, this 28th day of December, 1967.

CHARLES H. PHILLIPS, JR.
Circuit Judge

Opinion of District Court of Appeal of Florida Second District

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT, JULY TERM, A. D. 1968

Case No. 67-426

JOSEPH WALLER, JR.,

Appellant,

—v.—

STATE OF FLORIDA,

Appellee.

Opinion filed August 28, 1968.

Appeal from the Circuit Court for Pinellas County; Charles M. Phillips, Jr., Judge.

LESLIE HAROLD LEVINSON, Gainesville, and
GARDNER W. BECKETT, JR., St. Petersburg,
for Appellant.

EARL FAIRCLOTH, *Attorney General,* Tallahassee, and
WILLIAM D. ROTH, *Assistant Attorney General,* Lakeland,
for Appellee.

PER CURIAM.

The appellant appeals a judgment and sentence imposed upon him after a jury found him guilty of the crime of grand larceny.

The appellant was one of a number of persons who removed a mural which was on a wall of the City Hall in St. Petersburg, Florida. After the mural was removed the appellant, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers who recovered it after a scuffle with the appellant and others. When the mural was recovered by the police officers it was in a damaged condition.

The appellant was charged by the City of St. Petersburg with the violation of two ordinances, to-wit: destruction of city property and disorderly breach of the peace. Trial was held in the municipal court after which the appellant was found guilty on both violations and sentence was imposed.

Thereafter an information was filed against the appellant charging him with grand larceny. This information was based on the same acts of the appellant as were involved in the violation of the two city ordinances. The appellant filed a motion to quash the information on the ground that the prosecution under the information was barred by the prior convictions of the appellant in the municipal court. Said motion was denied and the appellant filed a suggestion for writ of prohibition in the Supreme Court of Florida. The Supreme Court denied said petition without opinion. Waller v. Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Fla., 1967, 201 So.2d 554.

On appeal here the appellant contends that he was twice put in jeopardy since prior to his conviction of grand larceny he had been convicted by the municipal court of an included offense of the crime of grand larceny.

Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of

grand larceny, the appellant nevertheless has not twice been put in jeopardy, because even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894, as is established in the case of Theisen v. McDavid, 34 Fla. 440, 16 So. 321. The Florida Supreme Court has followed the Theisen case, supra, throughout the years and as recently as July 17, 1968, in Hilliard v. City of Gainesville, Florida, Case No. 37,238, reaffirmed the Theisen case and stated as follows:

> "This double jeopardy argument has long been settled contrary to the claims of the petitioner. We see no reason to recede from our established precedent on the subject. Long ago it was decided that an act committed within municipal limits may be punished by city ordinance even though the same act is also proscribed as a crime by a state statute. An offender may be tried for the municipal offense in the city court and for the crime in the proper state court. Conviction or acquittal in either does not bar prosecution in the other."

The appellant next contends that the mural was a permanent fixture on the wall of the City Hall and therefore was "real property" and not subject to larceny. Appellant relies on the fact that the painting or mural was affixed to the wall by an adhesive and that this made it a permanent fixture and therefore a part of the real property.

We cannot agree with the appellant's position and the record on appeal clearly establishes that the painting or

mural was that type of property which may be a subject of larceny.

Next, the appellant contends that in view of the fact that the mural was removed in full daylight, in the presence of police officers and that appellant and the mural remained in the view of police officers until it was recovered, that as a matter of law the requisite felonious intent required to establish the crime of larceny was not shown.

With this we do not agree. The trial court properly instructed the jury on the essential elements of the crime of larceny and the question of intent required to establish that crime was properly submitted to the jury and resolved by it against the appellant.

The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit. Among these assignments of error and points on appeal, the appellant has contended that the trial court erred not only in refusing numerous requested instructions but also in the instructions which were given to the jury. We have reviewed the entire instructions and find that the court properly and correctly instructed the jury in this case.

For the foregoing reasons the judgment and sentence is affirmed.

Lilles, C.J., and Pierce and Hobson, JJ., Concur.

Order Denying Petition for Rehearing

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT
JULY TERM, A. D. 1968
Tuesday, September 17, 1968
Case No. 67-426

JOSEPH WALLER, JR.,

App

VS.

STATE OF FLORIDA,

Ap

Counsel for Appellant having filed in this cause a
tion for Rehearing and the same having been cons
by the Court, it is

ORDERED that the said Petition be and the same is h
denied.

The application of Appellant to delay issuance
Mandate is denied.

Order by Supreme Court of Florida, Directing Circuit Court to Release Defendant on Bond, November 6, 1968

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1968

Wednesday, November 6, 1968

Case No. 37,868

JOSEPH WALLER, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Upon consideration of petitioner's motion under Rule 3.9, Florida Appellate Rules, requesting this Court to review an order of the Circuit Court, Sixth Judicial Circuit in and for Pinellas County, Florida, revoking bail, the motion is granted and said Circuit Court is hereby directed to order the petitioner released under his original appeal bond pending final determination of the Petition for Writ of Certiorari filed in this Court.

Order by Supreme Court of Florida Denying Writ of Certiorari, December 4, 1968

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1968

Wednesday, December 4, 1968

Case No. 37,868

District Court of Appeal, Second District

JOSEPH WALLER,

Petitioner,

—vs.—

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

No 24
OT 1969

Supreme Court of the United States

No. 846 ---------, October Term, 19 68

Joseph Waller, Jr.,

Petitioner,

v.

Florida

Order allowing certiorari. Filed June 23 ---------, 19 69.

The petition herein for a writ of certiorari to the ~~Supreme Court~~ District Court of Appeal of the State of Florida, ~~is granted~~ Second Circuit, is granted, and the case is placed on the summary calendar and set for oral argument immediately following No. 1099.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

DEC 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~[illegible]~~ 24

JOSEPH WALLER, JR.,

Petitioner,

—versus—

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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INDEX

TABLE OF CASES, STATUTES AND AUTHORITIES CITED

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JOSEPH WALLER, JR.,

Petitioner,

—versus—

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Petitioner, Joseph Waller, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Second District, entered on August 28, 1968, rehearing denied September 17, 1968, affirming the judgment and sentence entered on July 6, 1967 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of grand larceny.

A petition for writ of certiorari was denied by the Supreme Court of Florida on December 4, 1968, for want of jurisdiction.

Opinions Below

The opinion of the District Court of Appeal of Florida, Second District, is reported at 213 So. 2d 623, and is set out in the Appendix, *infra*, p. 15, together with a copy of the order denying rehearing entered on September 17, 1968. Appendix, *infra*, p. 19. The order of the Supreme Court of Florida denying the petition for writ of certiorari is set out in the Appendix, *infra*, p. 21.

Jurisdiction

The judgment of the District Court of Appeal of Florida, Second District, was rendered and entered on August 28, 1968. Rehearing was denied on September 17, 1968. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether successive municipal and state prosecutions of the same defendant arising out of the same conduct violate the rule against double jeopardy and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fourteenth Amendment where the trial judge imposed sentence after reading a pre-sentence investigation report which he refused to make available either to the defendant or to the appellate court.

Statement of the Case

A mural on a prominent wall inside the City Hall of St. Petersburg, Florida, depicted a group of Negroes (R. 116, 117).* Petitioner and a number of other persons who found the mural an offensive caricature of their race assembled outside the City Hall during business hours on December 29, 1966. Some members of the group entered the City Hall, removed the mural from the wall and carried it through the streets of the city until they were confronted by police officers. After a scuffle the police recovered the mural which by then was in a damaged condition.

Petitioner was charged by the City of St. Petersburg with the violation of two ordinances: destruction of city property and disorderly breach of the peace. The municipal court found him guilty on both charges and he was sentenced to be jailed for ninety days on each charge (R. 37, 39, 81).

While petitioner was serving the sentence imposed by the municipal court, an information was filed charging him with the felony of grand larceny, on the basis of the same conduct as was involved in the municipal court trial (R. 81). Before the grand larceny prosecution came on for trial, petitioner filed a motion to quash the information on the grounds that prosecution was barred by the double jeopardy provisions of the Florida and United States Constitutions. The motion was denied (R. 80-85). Petitioner then moved the Supreme Court of Florida, suggesting that a writ of prohibition issue to prevent the trial in view of the double

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* The symbol "R—" refers to the record on appeal to the District Court of Appeals of Florida, Second District.

jeopardy rule. The Supreme Court of Florida denied prohibition, without opinion. *State ex rel. Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County*, 201 So. 2d 554 (Fla. 1967).

Thereafter trial was held in the Circuit Court. The jury found petitioner guilty of grand larceny (R. 127). The judge directed a pre-sentence investigation to be conducted. On July 6, 1967, having received the pre-sentence investigation report, the court pronounced sentence of imprisonment for a term of from six months to five years (the statutory maximum), less the 170 days already spent in jail (R. 138). Petitioner unsuccessfully moved for discovery of the pre-sentence investigation report, both before and after sentencing (R. 139).

In preparing his appeal to the District Court of Appeal of Florida, Second District, petitioner moved the trial court to include the pre-sentence investigation report in the record on appeal. The motion was denied. Petitioner filed in the District Court of Appeal a certified copy of the trial court's order denying the motion. In his appellate brief and argument before the District Court of Appeal, petitioner insisted he had a federal constitutional right to discovery of the pre-sentence investigation report.

The District Court of Appeal affirmed, with opinion, on August 28, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d DCA, Fla., 1968), Appendix, *infra*, p. 15.

On the double jeopardy issue the District Court of Appeal stated:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has

not twice been put in jeopardy, because even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894 . . ." App., pp. 16-17.

The District Court of Appeal did not expressly rule upon the question of non-discovery of the pre-sentence investigation report. However the court evidently rejected petitioner's argument on the matter by stating, in its opinion:

"The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit." App., p. 18.

In affirming the denial of the motion for discovery of the pre-sentence report, the court was clearly following Florida law. *Morgan* v. *State of Florida*, 142 So. 2d 308 (2d DCA, Fla., 1962).

In his petition for rehearing, petitioner requested the District Court of Appeal to enlarge its opinion so as to identify and expressly rule upon the federal constitutional question of the pre-sentence investigation report. Rehearing was denied without opinion on September 17, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d DCA, Fla., 1968).

On September 27, 1968 petitioner filed a timely petition for writ of certiorari in the Supreme Court of Florida, followed by a supplemental statement on jurisdiction filed on October 16, 1968. The Supreme Court of Florida denied the petition on December 4, 1968, for want of jurisdiction.

Reasons for Granting the Writ

I.

Successive municipal and state prosecutions of the same defendant arising out of the same conduct are clear violations of the rule against double jeopardy, and have been justified only by outmoded theories which this Court has discarded; the rule against double jeopardy should be made fully applicable to the states by the due process clause of the Fourteenth Amendment.

Over sixty years ago this Court held that the double jeopardy rule bars successive prosecutions by a territory and by the United States, since both are arms of the same sovereign. *Grafton* v. *United States*, 206 U. S. 333, reiterated in *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253.

By analogy, successive prosecutions by municipal and state governments should be barred, since the municipality is a mere creature of the state exercising a delegated portion of the state's sovereignty. Antieau, Municipal Corporation Law, Sec. 4.A4 (1964).

The due process clause of the Fourteenth Amendment imposes some limits on the power of the states to prosecute a person twice for the same offense. *Palko* v. *Connecticut*, 302 U. S. 319 held that these limits were not coextensive with the limits imposed upon the federal courts by the Fifth Amendment. In later cases this Court held that the question in any given situation must be whether multiple state trials would lead to "fundamental unfairness." *Hoag* v. *New Jersey*, 356 U. S. 464; *Ciucci* v. *Illinois*, 356 U. S. 571. This Court indicated substantial interest in recon-

sidering the matter in *Cichos* v. *Indiana*, 385 U. S. 76, but eventually dismissed the writ of certiorari as having been improvidently granted.

At least two other courts have anticipated, in view of this Court's general expansion of the scope of the due process clause of the Fourteenth Amendment, that the double jeopardy clause of the Fifth Amendment is fully binding on the states by virtue of the Fourteenth Amendment. *State* v. *Farmer*, 48 N. J. 145, 224 A. 2d 481 (1966); *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (CA 2, 1965), *cert. den.* 383 U. S. 913.

Without a clear pronouncement by this Court, Florida and some other states have permitted successive prosecutions by municipal and state governments, justifying the practice by a variety of reasons which cannot be sustained.

The English common law, sometimes offered as a justification, in fact prohibits successive prosecutions by municipal and state governments. The matter was settled over three centuries ago in *R.* v. *Thomas*, 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K. B. 1662). In Canada, where the traditions of the English common law exist in a federal system, there is not a single recorded instance in which a defendant has been subjected to successive prosecutions by dominion, provincial and municipal governments, or by any two of the three. See Grant, Penal Ordinances and the Guarantee Against Double Jeopardy, 25 Geo. L. J. 293, 312 (1937); Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U. C. L. A. L. Rev. 1, 8-13 (1956).

Another justification often used in support of successive prosecutions by municipality and state is the alleged "sovereignty" of municipalities.

If municipalities were sovereign, successive municipal and state prosecutions could be viewed as successive prosecutions by two separate sovereigns, which this Court permitted in *Bartkus* v. *Illinois*, 359 U. S. 121, and in *Abbate* v. *United States*, 359 U. S. 187. Subsequent pronouncements by this Court have cast serious doubt upon the continued validity of the *Bartkus-Abbate* rule; see *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 78. And the severe critical comment provoked by *Bartkus* and *Abbate* suggests that this Court may wish to reconsider the rule they represent.

However the present case can be disposed of without disturbing the *Bartkus-Abbate* rule, since the analogy between successive federal and state prosecutions or vice versa (*Bartkus-Abbate*) is inapplicable to successive municipal-state prosecutions.

Municipalities are in fact not sovereign, and never were, as this Court pointed out in *Reynolds* v. *Sims*, 377 U. S. 533, 575. The correct analogy to successive municipal-state prosecutions is found in *Grafton*, *supra*, which prohibits successive territorial-federal prosecutions.

It is sometimes asserted that municipal proceedings are not "criminal" and consequently do not constitute prior jeopardy. However this Court has held that where the object of "quasi-criminal" proceedings is to penalize for the commission of an offense against the law, the safeguards applicable to criminal proceedings must be made available. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *In re Gault*, 387 U. S. 1.

Effective law enforcement will be perfectly possible if successive municipal and state prosecutions are eliminated; city and state prosecutors can cooperate so as to have each case tried in the appropriate court. See, e.g., *State* v. *Mark*, 23 N. J. 162, 128 A. 2d 487 (1957). Indeed the quality of law enforcement may be improved, since imposition of the double jeopardy rule may well discourage such practices as "the palpable ruse of a breach-of-the-peace charge concocted to give the police time to pursue their investigation" of a more serious crime. *Culombe* v. *Connecticut*, 367 U. S. 568, 631-32.

Consequently this Court should grant certiorari in order to announce that the due process clause of the Fourteenth Amendment prevents successive municipal and state prosecutions of the same defendant for the same conduct.

II.

A trial court which sentences on the basis of a secret pre-sentence investigation report violates the defendant's right to a fair trial, confrontation of witnesses and assistance of counsel as required by the due process clause of the Fourteenth Amendment; a similar violation occurs anew when an appellate court affirms the sentence without inclusion of the pre-sentence investigation report in the record on appeal.

This Court has held that a sentencing judge may refer to information contained in a pre-sentence investigation report. *Williams* v. *New York,* 337 U. S. 241; *Williams* v. *Oklahoma,* 358 U. S. 576.

Some of this Court's opinions strongly suggest that a defendant has a constitutionally protected right to examine and rebut the report. *Specht* v. *Patterson,* 386 U. S. 605; *Kent* v. *United States,* 383 U. S. 541; *Townsend* v. *Burke,* 334 U. S. 736. However this Court has not ruled directly on the point.

There is conflict among the circuits. The Fifth and Sixth Circuits hold that the defendant has a right to discovery and rebuttal of the pre-sentence investigation report, except perhaps in very special circumstances. *Stephan* v. *United States,* 133 F. 2d 87 (CA 6, 1943), *cert. den.* 318 U. S. 78; *Smith* v. *United States,* 223 F. 2d 750 (CA 5, 1955). Other circuits leave the matter within the discretion of the trial judge, so long as the statutes and rules leave it there. *Powers* v. *United States,* 325 F. 2d 666 (CA 1, 1963); *United States* v. *Weiner,* 376 F. 2d 42 (CA 3,

1967); *Friedman* v. *United States*, 200 F. 2d 690 (CA 8, 1952).

There is increasing recognition of the need to protect the defendant as much during the sentencing process as during the earlier parts of his trial. *Mempa* v. *Rhay*, 389 U. S. 128. Committees of the American Bar Association, the American Law Institute and the President's Commission on Law Enforcement and Administration of Justice have joined numerous legal scholars in recommending that the defendant or his counsel be permitted to examine and rebut the pre-sentence investigation report.*

The English practice has long permitted disclosure of the pre-sentence investigation report. Thomas, Appellate Review of Sentences and the Development of Sentencing Policy: the English Experience, 20 Ala. L. Rev. 193 (1968).

Without access to the pre-sentence investigation report, a defendant has no opportunity to correct errors which may

* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, Tentative Draft, Sec. 4.4 (1967); American Law Institute, Model Penal Code, Proposed Official Draft, Sec. 7.07 (5)(6) (1962); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144-45 (1967); Bar Association of the District of Columbia, Junior Bar Section, Discovery in Criminal Cases, 33 F.R.D. 47, 127 (1963); Guzman, Defendant's Access to Presentence Reports in Federal Criminal Courts, 52 Iowa L. Rev. 161 (1966); Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. 12, 38 (1964); Lorensen, The Disclosure to Defense of Presentence Reports in West Virginia, 69 W. Va. L. Rev. 159, 166 (1967); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum. L. Rev. 702 (1958); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968); Note, Right of Offenders to Challenge Reports Used in Determining Sentences, 49 Colum. L. Rev. 567 (1949).

have been made by the probation officer preparing the report, nor can the defendant offer information which may have been omitted. Without inclusion of the pre-sentence investigation report in the record on appeal, the appellate court has no opportunity to review the sentencing discretion of the trial judge.*

One of the fundamental rights of all parties before courts or tribunals is to know what evidence is being used. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292. It is time for this fundamental right to be guaranteed to defendants, not only in connection with the determination of guilt or innocence, but also in connection with sentencing.

Consequently this Court should grant certiorari in order to guarantee that defendants have fair opportunity to examine and rebut pre-sentence investigation reports.

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* In this case, the real possibility of the abuse of discretion is suggested by the fact that the trial judge was reversed twice by Florida appeal courts because of his arbitrary refusal to release petitioner on bond pending appeal. The first time, he was reversed by the District Court of Appeal, Second District, reported as *Waller* v. *State*, 208 So. 2d 147 (2d DCA, Fla., 1968). The second time, he was reversed by the Florida Supreme Court (unreported order). As reported in the St. Petersburg (Florida) Times, November 20, 1968, p. 6B: "Phillips denied Waller access to bail Oct. 5, labeling the action 'a benefit to society.' The State Supreme Court on Nov. 12 reversed Phillips and ordered him to reinstate Waller's $2,500 bond. The high court has not yet acted on Waller's petition for review of his conviction . . ."

CONCLUSION

In view of the considerations set forth above, we respectfully submit that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner

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St. Petersburg, Florida 33701
Of Counsel

December, 1968.

APPENDIX

Opinion of the District Court of Appeal of Florida, Second District

DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

No. 67-426

JOSEPH WALLER, JR.,

Appellant,

—v.—

STATE OF FLORIDA,

Appellee.

Aug. 28, 1968

Rehearing Denied Sept. 17, 1968

Leslie Harold Levinson, Gainesville, and Gardner W. Beckett, Jr., St. Petersburg, for appellant.

Earl Faircloth, Atty. Gen., Tallahassee, and William D. Roth, Asst. Atty. Gen., Lakeland, for appellee.

PER CURIAM:

The appellant appeals a judgment and sentence imposed upon him after a jury found him guilty of the crime of grand larceny.

The appellant was one of a number of persons who removed a mural which was on a wall of the City Hall in

St. Petersburg, Florida. After the mural was removed the appellant, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers who recovered it after a scuffle with the appellant and others. When the mural was recovered by the police officers it was in a damaged condition.

The appellant was charged by the City of St. Petersburg with the violation of two ordinances, to-wit: destruction of city property and disorderly breach of the peace. Trial was held in the municipal court after which the appellant was found guilty on both violations and sentence was imposed.

Thereafter an information was filed against the appellant charging him with grand larceny. This information was based on the same acts of the appellant as were involved in the violation of the two city ordinances. The appellant filed a motion to quash the information on the ground that the prosecution under the information was barred by the prior convictions of the appellant in the municipal court. Said motion was denied and the appellant filed a suggestion for writ of prohibition in the Supreme Court of Florida. The Supreme Court denied said petition without opinion. State ex rel. Waller v. Circuit Court for Sixth Judicial Circuit, in and for Pinellas County, Fla. 1967, 201 So. 2d 554.

On appeal here the appellant contends that he was twice put in jeopardy since prior to his conviction of grand larceny he had been convicted by the municipal court of an included offense of the crime of grand larceny.

Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has not twice been put in jeopardy, because even if a person has been

tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894, as is established in the case of Theisen v. McDavid, 34 Fla. 440, 16 So. 321, 26 L.R.A. 234. The Florida Supreme Court has followed the Theisen case, supra, throughout the years and as recently as July 17, 1968, in Hilliard v. City of Gainesville, Fla., —— So.2d ——, reaffirmed the Theisen case and stated as follows:

> "This double jeopardy argument has been settled contrary to the claims of the petitioner. We see no reason to recede from our established precedent on the subject. Long ago it was decided that an act committed within municipal limits may be punished by city ordinance even though the same act is also proscribed as a crime by a state statute. An offender may be tried for the municipal offense in the city court and for the crime in the proper state court. Conviction or acquittal in either does not bar prosecution in the other."

The appellant next contends that the mural was a permanent fixture on the wall of the City Hall and therefore was "real property" and not subject to larceny. Appellant relies on the fact that the painting or mural was affixed to the wall by an adhesive and that this made it a permanent fixture and therefore a part of the real property. We cannot agree with the appellant's position and the record on appeal clearly establishes that the painting or mural was that type of property which may be a subject of larceny.

Next, the appellant contends that in view of the fact that the mural was removed in full daylight, in the presence

of police officers and that appellant and the mural remained in the view of police officers until it was recovered, that as a matter of law the requisite felonious intent required to establish the crime of larceny was not shown.

With this we do not agree. The trial court properly instructed the jury on the essential elements of the crime of larceny and the question of intent required to establish that crime was properly submitted to the jury and resolved by it against the appellant.

The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit. Among these assignments of error and points on appeal, the appellant has contended that the trial court erred not only in refusing numerous requested instructions but also in the instructions which were given to the jury. We have reviewed the entire instructions and find that the court properly and correctly instructed the jury in this case.

For the foregoing reasons the judgment and sentence is affirmed.

Liles, C. J., and Pierce and Hobson, JJ., concur.

Order Denying Rehearing

[Entered September 17, 1968]

IN THE

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

IN AND FOR THE SECOND DISTRICT

JULY TERM, A. D. 1968

Tuesday, September 17, 1968

Case No. 67-426

JOSEPH WALLER, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

The application of Appellant to delay issuance of the Mandate is denied.

A TRUE COPY

TEST:

/s/ JOSEPH E. GILLEN
Clerk, District Court of Appeal
Second District

CC: Leslie Harold Levinson
Gardner W. Beckett, Jr.
William D. Roth

Order Denying Petition for Writ of Certiorari

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1968

Wednesday, December 4, 1968

Case No. 37,868

DISTRICT COURT OF APPEAL

SECOND DISTRICT

JOSEPH WALLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

/s/ SID J. WHITE
Sid J. White
Clerk Supreme Court.

CC: Hon. Joseph E. Gillen
Hon. Harold Mullendore
Hon. Leslie Harold Levinson
Hon. Gardner W. Beckett, Jr
Hon. William D. Roth

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~000~~ 24

JOSEPH WALLER, JR.,

Petitioner,

—vs

THE STATE OF FLORIDA,

Respondent.

Response to Petition for a Writ of Certiorari to the District Court of Appeal, Second District, State of Florida

EARL FAIRCLOTH
Attorney General

WILLIAM D. ROTH
Assistant Attorney General
Post Office Box AQ
Lakeland, Florida 33802

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 846

JOSEPH WALLER, JR.,

Petitioner,

—vs

THE STATE OF FLORIDA,

Respondent.

Response to Petition for a Writ of Certiorari to the District Court of Appeal, Second District, State of Florida

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PRELIMINARY STATEMENT

The petition for writ of certiorari supports the allegations of facts by references to those court opinions found in its appendix. The state presents in its response the pertinent Florida Statutes and a reproduction of that portion of the record on appeal to the District Court of Appeal of Florida, Second District, which contains the pertinent ordinances of the city of St. Petersburg, Florida, on which petitioner was convicted in municipal court.

OPINION BELOW

Respondent concedes that the pertinent opinion herein sought to be reviewed is reported at 213 So.2d 623, and that such opinion is accurately depicted in the appendix of petitioner's petition.

JURISDICTION

Respondent concedes that appropriate jurisdiction to entertain this proceeding is vested in this court pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

QUESTIONS PRESENTED

The following questions will parallel the issues raised by their corresponding numbers in the petition for writ of certiorari.

1. WHETHER SUCCESSIVE MUNICIPAL AND STATE PROSECUTIONS OF THE SAME DEFENDANT ARISING OUT OF THE SAME CONDUCT BUT NOT FOR THE SAME CRIME VIOLATE THE RULE AGAINST DOUBLE JEOPARDY AND THEREBY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

2. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE STATES TO MAKE AVAILABLE THE PRESENTENCE INVESTIGATION REPORT WHICH WAS CONSIDERED BY THE TRIAL JUDGE BEFORE SENTENCING.

REASONS FOR DENYING THE WRIT

1. SUCCESSIVE MUNICIPAL AND STATE PROSECUTIONS OF THE SAME DEFENDANT ARISING OUT OF THE SAME CONDUCT BUT NOT FOR THE SAME CRIME DO NOT VIOLATE THE RULE AGAINST DOUBLE JEOPARDY AND THEREBY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The facts of this case do not present a double jeopardy question. Clearly the facts of this case do not require this tribunal to reach the question of whether the double jeopardy clause of the Fifth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. Petitioner says on page 3 of the petition that the grand larceny charge arose out of the same conduct which gave rise to the municipal charges. Again, in the statement of the first question, petitioner alludes to the same conduct. Nowhere does petitioner allege that the state charge was the same as charges on which petitioner was tried in municipal court. The municipal ordinances clearly do not encompass and are not lesser included offenses of the Florida larceny statute (Appendix, infra, pages 1a-2a). Had petitioner been charged in the state court under Section 822.03, Florida Statutes, and Section 877.03, Florida Statutes, which encompass the same crimes as those charged in the municipal court, then the double jeopardy question would be before this court (Appendix, infra, page 2a). The larceny statute in Florida requires that the taking be with the intent to deprive or defraud the true owner of the property or of the use and the benefit thereof (Appendix, infra, page 2a). This element is lacking in the destruction of city property and breach of the peace ordinances.

Petitioner could have been prosecuted originally in state court for grand larceny, breach of the peace, and injuring a public building. Because petitioner was prosecuted on the latter two in municipal court surely does not invoke a double jeopardy question.

In *Cichos v. Indiana,* 385 U.S. 76, it was conceded that both crimes required identical proof to sustain a conviction under Indiana law. Such is not the situation in the present case.

Surely the states and their subdivisions are not prohibited from punishing conduct which results in commission of different crimes especially where the state and municipal trials are for different crimes.

2. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE STATES TO MAKE AVAILABLE THE PRESENTENCE INVESTIGATION REPORT WHICH WAS CONSIDERED BY THE TRIAL JUDGE BEFORE SENTENCING.

Petitioner concedes that the court was following the Florida law as set forth in *Morgan v. State,* Fla. App. 1962, 142 So.2d 308, in affirming the denial of the motion for discovery of the presentence investigation report. The same interpretation has been followed by the Florida courts up to the present *(Martino v. State,* Fla. App. 1968, 215 So.2d 495).

A proper analogy cannot be made between the federal sentencing procedure and that of the State of Florida. Federal Rules of Criminal Procedure, Rule 32(c) lodges in the trial judge the discretion to disclose all or a part of the presentence investigation report and

further affords the defendant or his counsel the right to comment on the contents. No such discretion is available to the trial courts in the State of Florida.

The question presented here is not whether the state should make presentence investigation reports available but whether the holding that such report is confidential is prohibited by the Constitution of the United States. Petitioner has presented a long array of authorities favoring disclosure. Other authorities oppose, with equal vigor, the disclosure of the contents of presentence investigation reports.[1]

Respondent recognizes that some jurisdictions give the defendant the right of access to the presentence report. However, this issue should be decided on strict constitutional guide lines. A similar attack has been made on the prosecution by information not preceded by an indictment or a probable cause hearing. As desirable as some may urge that the federal practice of charging by grand jury indictment is, there is no federal constitutional impediment to dispensing entirely with the grand jury system in state proceedings *(Beck v. Washington,* 369 U.S. 541; *Hurtado v. California,* 110 U.S. 516).

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[1] For arguments opposing disclosure, see Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed. Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—a Survey (1964); Keve, the Probation Officer Investigates, 6-15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed. Prob. March 1964, p. 3; Sharp, the Confidential Nature of Presentence Reports, 5 Cath. U.L. Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed. Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed. Prob. March 1960, p. 10.

It appears that the rationale of this Court's opinion in *Specht v. Patterson,* 386 U.S. 605, was that the Colorado criminal procedure concerning the invocation of the Sex Offenders' Act had the affect of making a new charge leading to punishment. Respondent agrees that under these circumstances, it could not be seriously questioned that the failure to grant a hearing and the right of confrontation violates the due process clause of the Fourteenth Amendment. The issue reached in *Kent v. United States,* 383 U.S. 541, was the question of the procedural safeguards that must be afforded a juvenile in a binding over procedure by the juvenile court. In *Townsend v. Burke,* 334 U.S. 736, the lack of due process arose from the failure of the defendant to be represented by counsel at the sentencing.

It may well be that the State of Florida, through its newly-apportioned legislature, may see fit to follow the trend in this area. It is submitted, however, that this fact is no reason for saying that the due process clause of the Fourteenth Amendment, concerning the defendant's right to a fair trial, confrontation of witnesses, and assistance of counsel, applies to the specific issue of revealing the contents of presentence investigation reports.

CONCLUSION

It is concluded that not only was there no violation of the jeopardy provision, or the due process clause of the Fourteenth Amendment, but that in fact the issues raised by the petition for writ of certiorari did not lie within the broad scope of reversible error.

WHEREFORE, this Court is respectfully requested to deny the petition for writ of certiorari.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

WILLIAM D. ROTH
Assistant Attorney General

Counsel for Respondent

25.14 DESTROYING, ETC., OF PUBLIC PROPERTY.

It shall be unlawful for any person maliciously or wilfully to destroy, mutilate, injure or deface any of the public buildings, grounds, signs, sidewalks, electric lights, electric light poles or other property of the city.

It shall be unlawful for any officer or employee of any municipal department, or any other person, to destroy, injure, remove or disturb any bench, mark or monument in any street or public place in the city without first procuring a permit from the city manager. (Code 1955, ch. 25, § 12.)

[As to malicious injury to buildings and structures, see Florida Statutes, 1961, § § 822.01 to 822.23. For state law as to trespass and injuring real property, see Florida Statutes, 1961, § § 821.01 to 821.37.]

25.15 DISORDERLY CONDUCT.

Any person who shall make, aid, countenance or assist in making any improper noise, disturbance or breach of the peace or diversion tending to a breach of the peace; any person found in a disorderly house, house of ill fame or gaming house; any person who shall engage in or aid or abet in any fight, quarrel or other disturbance; any person who stands, loiters or strolls about in any place in the city waiting or seeking to obtain money or other valuable thing from others by trick or fraud or who aids or assists therein; any person who shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in the city or who shall aid or abet or in any manner be concerned therein; any person who shall window peep; or any person who shall engage in any

indecent or obscene conduct in any public place shall be deemed guilty of disorderly conduct, and it shall be unlawful for any person to commit disorderly conduct. (Code 1955, ch. 25, § 13.)

[For authority to punish disorderly conduct, see Char., § 3, subsec. (0).]

25.16 DISORDERLY HOUSES, ETC.

FLORIDA STATUTES

1967

822.03 Injuring public buildings or structures.—Whoever wantonly, willfully or maliciously shall mar, deface, injure or mutilate the capitol, or any public state, county or municipal building or structure, or any church, synagogue, or any building used by a civic or charitable organization, or the contents or the walls thereof, or the fence, or the trees, or the grounds, or shall cause same to be done, shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding $500.00

877.03 Breach of the peace; disorderly conduct.—Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor, and subject to punishment as provided by law.

811.021 Larceny defined; penalties; sufficiency of indictment, information or warrant.—(1)(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense,

or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; or

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 24

JOSEPH WALLER, JR.,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 24

JOSEPH WALLER, JR., *Petitioner,*

versus

STATE OF FLORIDA, *Respondent.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court of Appeal of Florida, Second District is reported at 213 So. 2d 623 (2d DCA, Fla. 1968) (App. 52a). The order of the same court denying rehearing is noted at 213 So. 2d 623 (App. 56a). The order of the Supreme Court of Florida, denying certiorari for lack of jurisdiction, is reported in memorandum form at 221 So. 2d 749 (Fla. 1968) (App. 58a).

Jurisdiction

The judgment of the District Court of Appeal of Florida, Second District was rendered and entered on August 28, 1968 (App. 52a). Rehearing was denied on September 17, 1968 (App. 56a). The petition for a writ of certiorari was filed in this Court on December 16, 1968 and was granted on June 23, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 12 of the Declaration of Rights of the Constitution of the State of Florida (1885) provides, in part:

"Section 12. Double jeopardy; self-incrimination; eminent domain; right to work.—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . ."

(*Note*: Substantially the same language appears in the 1968 revision of the Florida Constitution, Article I, Section 9.)

Florida Statutes (1967), Section 811.021 provides, in part:

"811.021 Larceny defined; penalties; sufficiency of indictment, information or warrant.—

(1) A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; . . .

(c) . . . steals such property, and is guilty of larceny.

(2) If the property stolen is of the value of one hundred dollars or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00."

Section 25.14 of the City of St. Petersburg, Florida, Code (1963) provides:

"25.14 Destroying, etc. of public property.

It shall be unlawful for any person maliciously or wilfully to destroy, mutilate, injure or deface any of

the public buildings, grounds, signs, sidewalks, electric lights, electric light poles or other property of the city.

It shall be unlawful for any officer or employee of any municipal department, or any other person, to destroy, injure, remove or disturb any bench, mark or monument in any street or public place in the city without first procuring a permit from the city manager. (Code 1955, ch. 25, sec. 12.)

[As to malicious injury to buildings and structures, see Florida Statutes, 1961, secs. 822.01 to 822.23. For state law as to trespass and injuring real property, see Florida Statutes, 1961, secs. 821.01 to 821.37.]

Section 25.15 of the City of St. Petersburg, Florida, Code (1963) provides:

"25.15 Disorderly conduct.

Any person who shall make, aid, countenance or assist in making any improper noise, disturbance or breach of the peace or diversion tending to a breach of the peace; any person found in a disorderly house, house of ill fame or gaming house; any person who shall engage in or aid or abet in any fight, quarrel or other disturbance; any person who stands, loiters or strolls about in any place in the city waiting or seeking to obtain money or other valuable thing from others by trick or fraud or who aids or assists therein; any person who shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in the city or who shall aid or abet or in any manner be concerned therein; any person

who shall window peep; or any person who shall engage in any indecent or obscene conduct in any public place shall be deemed guilty of disorderly conduct, and it shall be unlawful for any person to commit disorderly conduct. (Code 1955, ch. 25, sec. 13.)

Questions Presented

1. Whether successive municipal and state prosecutions of petitioner arising out of the same conduct violate the rule against double jeopardy and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fourteenth Amendment where the trial judge imposed sentence after reading a pre-sentence investigation report which he refused to make available either to petitioner or to the appellate court.

Statement of the Case

A mural on a prominent wall inside the City Hall of St. Petersburg, Florida depicted a group of Negroes (R. 116-117).* Petitioner and a number of other persons who found the mural an offensive caricature of their race, assembled outside the City Hall during business hours on

* The symbol "R." refers to the first volume of the record on appeal, prepared by the Clerk of the Circuit Court, Pinellas County, and sent to the District Court of Appeal of Florida, Second District. This volume consists of papers other than the trial transcript.

December 29, 1966. Some members of the group entered the City Hall, removed the mural from the wall and carried it through the streets of the city until they were confronted by police officers. After a scuffle the police recovered the mural which by then was in a damaged condition (Trial trans. 225-226, App. 35a-36a).*

Petitioner was charged by the City of St. Petersburg with the violation of two ordinances: destruction of city property (St. Petersburg Code (1963) sec. 25.14); and disorderly breach of the peace (sec. 25.15). The municipal court found him guilty on both charges and on January 30, 1967 he was sentenced to be jailed for ninety days on each of the two charges, the sentences to be served consecutively (R. 37, 39, 81; App. 8a-11a).

While petitioner was serving the sentence imposed by the municipal court, an information was filed charging him with the felony of grand larceny, on the basis of the same conduct as was involved in the municipal court trial (R. 81; Trial Trans. 96, 238, 421; App. 3a-4a, 15a-16a).

(Still later, three additional informations were filed on the basis of the same conduct, charging petitioner with the misdemeanors of unlawful assembly, malicious destruction of public property, and resisting arrest without violence. R. 27-35; App. 5a-7a. The three misdemeanor informations were dropped by the County Prosecuting Attorney after

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* The symbol "Trial trans." refers to the transcript of the trial in the Circuit Court. The transcript was sent by the Clerk of the Circuit Court to the District Court of Appeal, as part of the record on appeal. Since the first volume of the record on appeal consisted of papers other than the trial transcript (see previous note), the first volume of the trial transcript was entitled Volume II of the record on appeal. The original page numbering of the trial transcript was not changed.

petitioner, through his counsel, argued they violated the rule against double jeopardy. Accordingly they are not part of the present case.)

Before the grand larceny prosecution came on for trial, petitioner filed a motion in the Circuit Court where trial was to be held, seeking to quash the information on the grounds that prosecution was barred by the double jeopardy provisions of the Florida and United States Constitutions. The motion was denied (R. 80-85, App. 13a-17a). Petitioner then moved the Supreme Court of Florida, suggesting that a writ of prohibition issue to prevent the trial in view of the double jeopardy rule. The Supreme Court of Florida denied prohibition, without opinion. *State ex rel. Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County*, 201 So. 2d 554 (Fla. 1967).

Thereafter trial was held in the Circuit Court. The jury found petitioner guilty of grand larceny (R. 127). The judge directed a pre-sentence investigation to be conducted. On July 6, 1967, having received the pre-sentence investigation report, the court pronounced sentence of imprisonment for a term of from six months to five years (the statutory maximum, Florida Statutes (1967) sec. 811.021 (2)), less the 170 days already spent in jail (R. 138). Petitioner unsuccessfully moved for discovery of the pre-sentence investigation report, both before and after sentencing (R. 139, App. 43a-45a, 46a-48a).

In preparing his appeal to the District Court of Appeal of Florida, Second District, petitioner moved the trial court to augment the record on appeal by including the pre-sentence investigation report. The motion was denied

(R—Fla. S. Ct.—item 2; App. 49a-51a).* Petitioner filed in the District Court of Appeal a certified copy of the trial court's order denying the motion to augment the record. In his appellate brief and argument before the District Court of Appeal, petitioner insisted he had a federal constitutional right to discovery of the pre-sentence investigation report.

The District Court of Appeal affirmed, with opinion, on August 28, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d D.C.A., Fla. 1968) (App. 52a).

On the double jeopardy issue the District Court of Appeal stated:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has not twice been put in jeopardy, because even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894 . . . " (App. 53a-54a).

The District Court of Appeal did not expressly rule upon the question of non-discovery of the pre-sentence investigation report. However the court evidently rejected petitioner's argument on the matter by stating, in its opinion:

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* The symbol "R—Fla. S. Ct.—" refers to the record made up by the Clerk of the Supreme Court of Florida and sent directly to this Court, following denial of certiorari by the Supreme Court of Florida. This record consists of a number of items; individual pages are not numbered.

"The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit" (App. 55a).

In affirming the denial of the motion for discovery of the pre-sentence investigation report, the court was clearly following Florida law. *Morgan* v. *State,* 142 So. 2d 308 (2d D.C.A., Fla. 1962).

In his petition for rehearing, petitioner requested the District Court of Appeal to enlarge its opinion so as to identify and expressly rule upon the federal constitutional question of the pre-sentence investigation report. Rehearing was denied without opinion on September 17, 1968. *Waller* v. *State,* 213 So. 2d 623 (2d D.C.A., Fla. 1968) (App. 56a).

On September 27, 1968 petitioner filed a timely petition for writ of certiorari in the Supreme Court of Florida, followed by a supplemental statement on jurisdiction filed on October 16, 1968 (R—Fla. S. Ct.—items 1, 2, 5). The Supreme Court of Florida denied the petition on December 4, 1968 for lack of jurisdiction. *Waller* v. *State,* 221 So. 2d 749 (Fla. 1968) (R—Fla. S. Ct.—item 1; App. 58a).

Summary of Argument

1. *The double jeopardy question*

This Court recently declared the double jeopardy provisions of the Fifth Amendment to be binding on the states through the Fourteenth. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

In applying this rule, the prior municipal prosecution subjecting petitioner to imprisonment must be regarded as equivalent to a prior prosecution by the state itself.

Florida and a number of other states incorrectly hold that prior municipal prosecutions are not the equivalent of prior state prosecutions. They hold that municipalities are "sovereigns" distinct from the states, and accordingly that successive prosecutions by municipality and state are outside the scope of the double jeopardy rule.

The "separate sovereigns" theory derives some support from this Court's decisions in *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) and *Abbate* v. *United States,* 359 U.S. 187 (1959) which permitted successive prosecutions by the federal and state governments (and vice versa) because each was a separate sovereign. However the relationship between municipalities and states is not analogous to that between states and the federal government. *Bartkus* and *Abbate* are therefore not analogous to the problem of successive municipal and state prosecutions. A more appropriate analogy is provided by *Grafton* v. *United States,* 206 U.S. 333 (1907) which prohibits successive prosecutions by territorial and federal authorities, since they are both arms of the same sovereign.

The municipal prosecution subjecting petitioner to imprisonment represents the attachment of jeopardy, even though for some purposes municipal prosecutions have been described as civil or petty.

The municipal prosecution should bar subsequent prosecutions by the state for higher degrees of the same offense, even though the municipal court may lack jurisdiction over those higher degrees, since the municipal court has virtually unlimited jurisdiction to impose consecutive sentences of imprisonment upon multiple-count prosecutions.

The double jeopardy rule requires that a defendant be prosecuted not more than once, on the basis of a single act or course of conduct. The state may, within the discretion of the prosecutor, join a number of prosecutions in a single trial. If the state chooses not to join all prosecutions in a single trial, it should be barred from bringing subsequent prosecutions.

The compulsory joinder of all charges into a single trial should be required, not only to bar successive trials by the state itself, but also to bar successive trials by the municipal and state governments. Liaison between municipal and state prosecutors should enable them to decide which will prosecute a single act which violates the laws of each. If necessary, the state prosecutor can exert supremacy over the municipal prosecutor, since the state is sovereign vis-à-vis the municipality.

Petitioner had a constitutionally guaranteed right to be tried no more than once for his conduct. Before his trial in the municipal court, the state and city prosecutors could have and should have conferred to determine which of them would prosecute petitioner; one single prosecution should

have ensued. Since the state permitted the municipal trial to proceed, the state was from then onwards barred from bringing a subsequent prosecution. The double jeopardy provision, in order to give meaningful protection, must require compulsory joinder of all charges against an individual defendant arising out of a single act.

As an alternative to compulsory joinder, petitioner's second trial should have been barred by applying the established Florida doctrine of lesser included offense. Under the circumstances of this case, the two municipal charges of destruction of city property and disorderly breach of the peace were lesser included offenses within the state charge of grand larceny.

Municipal offenses may be lesser included degrees of state offenses. In the present case, the District Court of Appeal of Florida assumed, without deciding, that the municipal offenses were included within the state felony of grand larceny.

2. *The pre-sentence investigation report question*

This Court has held that a sentencing judge may refer to the information contained in a pre-sentence investigation report. Petitioner's constitutionally guaranteed rights to due process and a fair trial can be respected only by giving him access to any such report used by the judge. Furthermore, a defendant's traditional right to address the court before pronouncement of sentence is illusory unless the defendant knows the contents of any report used by the court. Without access to the pre-sentence report in this case, petitioner had no opportunity to correct errors or omissions.

Recently this Court held there must be some degree of appellate review over the sentencing process, so that in certain circumstances the sentencing court must provide an explanation of the facts it took into consideration. *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). Without access to the pre-sentence report in this case, petitioner had no opportunity to obtain appellate review of the trial court's exercise of its sentencing discretion.

ARGUMENT

I.

The State of Florida violated the Fourteenth Amendment to the Constitution of the United States when it prosecuted petitioner for grand larceny after he had previously been convicted in the municipal court of St. Petersburg, Florida for violation of city ordinances on the basis of the same conduct.

A. *The double jeopardy provisions of the Fifth Amendment to the Constitution of the United States are binding on the states through the Fourteenth Amendment.*

On the last day of last term, this Court held that the double jeopardy provision of the Fifth Amendment to the Constitution of the United States is incorporated into the due process clause of the Fourteenth Amendment, and is binding on the states. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

B. *In applying the double jeopardy rule within the State of Florida, the prior municipal prosecution subjecting petitioner to imprisonment must be regarded as equivalent to a prior prosecution by the State of Florida itself.*

A municipality is a creature of the state, not a separate sovereign

The District Court of Appeal of Florida held that the rule against double jeopardy was inapplicable to successive prosecutions by municipal and state governments, because each is a separate sovereign (App. 54a). This ruling followed Florida law. *Theisen* v. *McDavid,* 34 Fla. 440, 16 So. 321, 26 L.R.A. 234 (1894).

The theory of the separate sovereignty of municipalities, followed in Florida at least since *Theisen* was decided in 1894, is an easy means of avoiding the difficult problems which otherwise might arise in applying the double jeopardy rule to successive prosecutions by municipal and state governments. The separate sovereignty theory was articulated as early as *Mayor & Aldermen* v. *Allaire,* 14 Ala. 400 (1848) and has been adopted not only by Florida but also by a number of other states. McQuillin, Municipal Corporations, sec. 23.10 (3d ed. 1949, Supp. 1966); Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Oregon L. Rev. 281 (1964).*

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* The separate sovereignty theory is used to exempt successive prosecutions by municipal and state governments from the double jeopardy rule in: *Pike* v. *City of Birmingham,* 36 Ala. App. 53, 53 So. 2d 394 (1951), cert. den. 255 Ala. 664, 53 So. 2d 396 (1951); *United States* v. *Farwell,* 11 Alaska 507, 76 F. Supp. 35 (D. Alaska 1948)—applying Oregon precedents to the "organized and incorporated territory" of Alaska; *State* v. *Poynter,* 220 P. 2d 386 (Idaho, 1950); *People* v. *Behymer,* 48 Ill. App. 2d 218, 198 N.E. 2d 729 (1964); *State* v. *Garcia,* 198 Iowa 744, 200 NW 201 (1924); *Earwood* v. *State,* 198 Kan. 659, 426 P. 2d 151 (1967);

The separate sovereignty theory is untenable because municipalities are not in fact sovereign; they are mere subdivisions of the state. This Court observed, in connection with legislative apportionment:

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions. . . . The relationship of the states to the federal government could hardly be less analogous." *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964).

The subordinate status of the municipality vis-à-vis the state is clearly recognized in Florida law. Article VIII, Section 8 of the Florida Constitution (1885)* gives power to the State Legislature:

Louisiana ex rel. Ladd v. *Middlebrooks*, 270 F. Supp. 295 (E.D. La., 1967); *Johnson* v. *State*, 59 Miss. 543 (1882); *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233 (1923); *State* v. *Simpson*, 78 N.D. 360, 49 N.W. 2d 777 (1951); *Koch* v. *State*, 53 Ohio St. 433, 41 N.E. 689 (1895); *McCann* v. *State*, 82 Okl. Cr. 374, 170 P. 2d 562 (1946); *Miller* v. *Hansen*, 126 Ore. 297, 269 Pac. 864 (1928); *State* v. *Tucker*, 137 Wash. 162, 242 Pac. 363 (1926). *State* v. *Mills*, 108 W. Va. 31, 150 S.E. 142 (1929); *City of Milwaukee* v. *Johnson*, 192 Wis. 585, 213 N.W. 335 (1927); *State* v. *Jackson*, 75 Wyo. 13, 291 P. 2d 798 (1955). And see Note, Constitutional Law: Successive Municipal and State Prosecutions Found Permissible Despite Assumed Application of Double Jeopardy Clause (1968), Duke L. J. 362.

* The 1885 Florida Constitution, in force when petitioner was tried, has been replaced by the revised 1968 Florida Constitution, which provides increasing possibilities for local home rule, but certainly not for local "sovereignty."

"to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

And Article V, Section 1 of the Florida Constitution (1885, unchanged in 1968 revision) declares:

"the judicial power of the *State of Florida* is vested in a supreme court . . . and such other courts, *including municipal courts* . . . as the legislature may from time to time ordain and establish" (emphasis added).

Clearly, then, a municipality is a creature of the state, and the municipal courts exercise a portion of the judicial power of the state, as conferred upon them by the state legislature. The relationship between a municipality and the state is, therefore, not analogous to that between a state and the federal government. This case can be decided without reaching the problem of successive prosecutions by state and federal governments (and vice versa), which this Court permitted in *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) and *Abbate* v. *United States,* 359 U.S. 187 (1959).

A much more apt analogy to the relationship between municipal and state governments can be found in the relationship between the government of a territory and the government of the United States. *Grafton* v. *United States,* 206 U.S. 333 (1907), clearly held that a prosecution by a territorial court is a bar to a subsequent prosecution in a court of the United States, since both are arms of the same sovereign. This rule was reiterated in *People of Puerto Rico* v. *Shell Co.,* 302 U.S. 253 (1937). It is exactly this

analogy that should control to prevent two arms of a sovereign state from punishing the same act by means of successive municipal and state prosecutions. Antieau, Municipal Corporation Law, sec. 4A.04 (1968).

The Model Penal Code supports this view. The Code defines "statute" so as to include "a local law or ordinance of a political subdivision of the state." Model Penal Code, sec. 1.13 (1962). Presumably, for purposes of applying the rule against double jeopardy under the Model Penal Code, a prior prosecution under a local ordinance will be likened to a prior prosecution under a state statute.

The municipal prosecution subjecting petitioner to imprisonment represents the attachment of jeopardy

At common law, municipal prosecutions were sometimes regarded as civil actions, because they could result only in the imposition of fines. The municipal courts could not sentence to imprisonment, even in enforcement of the fines they had themselves imposed. *Clark's Case,* 5 Co. Rep. 64a, 77 Eng. Rep. 152 (K.B. 1596); *Kirk* v. *Nowill,* 1 T.R. 118, 99 Eng. Rep. 1006 (K.B. 1786); 2 Bacon's Abridgment 149 (1856 ed.); Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Oregon L. Rev. 281, 300-304 (1964).

The closest common law analogy to the present case appears to be *R.* v. *Thomas,* 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662). After the defendant had been acquitted of murder in a court in Wales he was indicted in England for the same murder. The King's Bench held that the indictment was barred by the rule against double jeopardy,

since "autrefois acquit in les Marches de Gales est bone plea ici in Angleterre." 1 Sid. 179, 82 Eng. Rep. 1043.

Today, even courts which have no power to imprison are classified as criminal, at least for some purposes. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965); *In re Gault,* 387 U.S. 1 (1967); *City of Miami* v. *Gilbert,* 102 So. 2d 818 (3d D.C.A., Fla., 1958). *A fortiori,* the prosecution of petitioner in the municipal court, which resulted in his imprisonment for two consecutive terms of 90 days each, was a criminal proceeding which constituted jeopardy for purposes of the double jeopardy rule.

The municipal prosecution should bar subsequent state prosecutions for higher degrees of offense, even though the municipal court lacked jurisdiction over the higher degrees

The municipal court had no jurisdiction to try the charge of grand larceny. This fact should not prevent operation of the double jeopardy rule to bar a subsequent trial for grand larceny in a court of higher jurisdiction.

A number of states permit successive prosecutions by municipality and state, at least to the extent that the municipal courts lack jurisdiction over higher degrees of offense subsequently prosecuted in higher level state courts. Arkansas Stats. Ann. sec. 43-1225 (1947); *Champion* v. *State,* 110 Ark. 44, 160 S.W. 878 (1913); *People* v. *Rodriguez,* 202 Cal. App. 2d 191, 20 Cal. Rptr. 556 (1962); *State* v. *Barnette,* 158 Maine 117, 179 A. 2d 800 (1962); *Bennett* v. *State,* 229 Md. 208, 182 A. 2d 815, 4 A.L.R. 3d 862 (1962); *Commonwealth* v. *Mahoney,* 331 Mass. 510, 120 N.E. 2d 645 (1954); *State* v. *Midgett,* 214 N.C. 107, 198 S.E. 613 (1938); *Commonwealth* v. *Bergen,* 134 Pa.

Super. 62, 4 A. 2d 164 (1939); *State* v. *Butler*, 94 S.E. 2d 761 (S.C. 1956); *Mangan* v. *State*, 344 S.W. 2d 448 (Tex. Cr. 1961). See also *Diaz* v. *United States*, 223 U.S. 442 (1912); Annotation, Conviction or Acquittal of One Offense, in Court having No Jurisdiction to try Offense arising out of Same Set of Facts, Later Charged in Another Court, as Putting Accused in Jeopardy of Latter Offense, 4 A.L.R. 3d 874 (1965); Note, State v. Barnette: Two Punishments for a Single Act, 17 Maine L. Rev. 252 (1965).

But this view frustrates one of the major policies of the double jeopardy rule, that of preventing multiple trials arising out of the same act. When petitioner was prosecuted in the municipal court, admittedly that court could not find him guilty of grand larceny, because it had no jurisdiction over that felony. Therefore, in the municipal court, petitioner was not in jeopardy of being punished for grand larceny. But he was in jeopardy of being punished for the same conduct as was destined later to form the basis of the grand larceny prosecution. And, in municipal court, petitioner was subject to being sentenced to consecutive terms of 90 days' imprisonment. As it happened, he was charged with two municipal offenses, and was therefore sentenced to no more than two consecutive 90-day sentences.

The tendency of municipal courts in Florida to impose multiple-term sentences was strikingly illustrated in *James* v. *Headley*, 410 F. 2d 325 (CA 5, 1969), where two defendants in a municipal court in Florida had been liable to potential sentences of 600 days and 240 days respectively. The Court of Appeals for the Fifth Circuit held that, for purposes of determining the right to appointed counsel, the total "package" of potential punishments must be con-

sidered. And in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that for the purpose of determining the right to jury trial, the total potential punishment must be considered. Similarly, then, for the purpose of determining the jurisdictional limits of the first court in which a defendant is tried, it is appropriate to consider the total "package" of potential punishments. This package should include not only the maximum punishment for the offenses charged, but also the maximum for any other offense which could have been charged; see discussion of compulsory joinder, *infra*.

C. The double jeopardy rule required that petitioner be tried not more than once on the basis of a single act or course of conduct, even though he may simultaneously have violated municipal ordinances and state statutes. This conclusion is compelled, either by applying a requirement of compulsory joinder, or alternatively by applying the law on lesser included offenses.

The double jeopardy rule prevents multiple punishments for the same act

The double jeopardy rule has been applied in widely varying types of situation. Understandably it has been interpreted flexibly, and not always consistently. Sometimes the issue arises when a defendant objects to multiple charges being prosecuted in a single trial, based either on a series of similar acts, *Yates* v. *United States*, 355 U.S. 66 (1957), or on a single act which simultaneously violates a number of statutes, *Gore* v. *United States*, 357 U.S. 386 (1958). At other times the double jeopardy arises in the context of multiple trials, based either on a series of similar acts carried out in execution of a single scheme, *United States* v. *Adams*, 281 U.S. 202 (1930), or on a single course

of conduct involving multiple victims, *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), *Ashe* v. *Swenson*, No. 57, October Term, 1969 (scheduled for argument immediately before the present case), or on a series of acts where one was "an incident and a part of" another, *In re Nielsen*, 131 U.S. 176 (1889). Varying interpretations of the double jeopardy rule are analyzed in Sigler, Double Jeopardy 63-69, 100-109 (1969); Note, Twice in Jeopardy, 75 Yale L. J. 262 (1965); Annotation, Modern Status of Doctrine of Res Judicata in Criminal Cases, 9 A.L.R. 3d 203 (1966).

The basic thrust of the double jeopardy rule is that there shall not be multiple punishments for the same act. *Ball* v. *United States*, 349 U.S. 81 (1955), *Prince* v. *United States*, 352 U.S. 322 (1937), *Heflin* v. *United States*, 358 U.S. 415 (1959). A collateral principle is that if multiple punishments are called for, they should be imposed at a single trial, under a requirement of compulsory joinder.

The compulsory joinder doctrine requires that, in situations where multiple punishments are called for, they should be imposed at a single trial

It was a clear policy of the common law that multiple trials to prosecute the same defendant for the same act should be prevented. This policy was carried out, not only by the pleas of *autrefois acquit* and *autrefois convict*, but also by the unwillingness of the courts to have their process abused by repetitious prosecutions based on the same act, even in situations where the *autrefois* pleas could not be used. *Connelly* v. *Director of Public Prosecutions*, (1964) 2 All E.R. 401 (H.L.), opinion of Pearce, L.J. at 447-448; *Regina* v. *Elrington*, 9 Cox Crim. Cas. 86, 90; 1 B & S 688, 121 Eng. Rep. 870 (Q.B. 1861); *Regina* v.

Walker, 2 Moo. & Rob. 446, 174 Eng. Rep. 345 (York Assizes, 1843); *Regina* v. *Stanton,* 5 Cox Crim. Cas. 324 (Worcester Assizes, 1851). Thus the common law of double jeopardy consists not only of the *autrefois* pleas, but also of the policy of compulsory joinder. Compulsory joinder is a rule of constitutional dimension, since it must be considered to be part of the meaning implicit in the Fifth Amendment rule against double jeopardy.

The Model Penal Code provision on compulsory joinder states:

> Sec. 1.07
>
> "(2) *Limitation on Separate Trials for Multiple Offenses.* Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.
>
> (3) *Authority of the Court to Order Separate Trials.* When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires."

"Conduct" is defined in the Code, sec. 1.13(5) as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions."

A similar compulsory joinder rule has been enacted in Illinois. Ill. Stat. Ann. ch. 38, sec. 3-3, with Committee Comments (Smith-Hurd, 1961).

By limiting compulsory joinder to offenses within the jurisdiction of a single court, the Model Penal Code drains compulsory joinder of much of its potency. Even a trial in a court of petty jurisdiction is a trial, within the contemplation of the basic policy that multiple trials should be avoided. And furthermore, while the municipal court of St. Petersburg may appear to have a jurisdictional limit of 90 days' imprisonment, in fact the court may expand this jurisdiction whenever it is faced with a multiple-count charge, by imposing consecutive sentences. Under these circumstances it may be difficult to state what precisely is the jurisdictional limit of the municipal court.

Compulsory joinder should be required, as an element of the double jeopardy provision of the Fifth Amendment, without regard to whether or not all the offenses fall within the jurisdiction of a single court. Later portions of this argument will suggest how this can be carried out within the framework of effective law enforcement.

The view of compulsory joinder urged here is supported by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, sec. 5.2(b) (Tentative Draft, 1967), which provides that after conviction but before sentencing, a defendant should be permitted to plead guilty to other offenses within the jurisdiction of the sentencing court, or any other court of coordinate *or inferior* jurisdiction. And see Dession, Final Draft of the Code of Correction for Puerto Rico, 71 Yale L. J. 1050,

1114-1115, n. 68 (1962); Annotation, Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defendant, 96 A.L.R. 2d 768 (1964); *Maynes* v. *People,* 454 P.2d 797 (Colo. 1969)—on related matter of merger of two sentences arising out of a single transaction.

The compulsory joinder doctrine requires a single trial, even of a defendant who allegedly has violated both municipal and state laws

The City of St. Petersburg Code contains a provision (sec. 25.69, Code of 1963) that every state misdemeanor committed within the city is also, automatically, a municipal offense. Petitioner was not prosecuted under this ordinance; the grand larceny charge in the Circuit Court was, in any event, a felony, and therefore outside the scope of this ordinance. It is cited here to indicate the City's policy in favor of concurrent jurisdiction of the city and the state over all misdemeanors. Such ordinances are valid under Florida law. *Orr* v. *Quigg,* 135 Fla. 653, 185 So. 726 (1938); *State ex rel. Springer* v. *Smith,* 189 So. 2d 846 (4th D.C.A., Fla., 1966).

No statistics are available on dual prosecutions by municipalities and the State of Florida.* To the best of counsel's knowledge and belief, very few persons in Florida are subjected to dual prosecutions. Evidently prosecutors find a "need" for dual prosecution only when they especially want either to hold the defendant, or to explore his de-

* Over two years ago, during the early stages of this case, counsel for petitioner requested such statistics from the Attorney General of Florida, who replied they were unavailable.

fense, or to bargain for the plea, or to "throw the book" at a particularly unpopular defendant.

In some states the municipality is not allowed to enact ordinances in areas covered by state penal statutes; the state is considered to have pre-empted the field. These states evidently do not experience the "need" for dual prosecution. (The problems of lesser included offenses and compulsory joinder may of course arise in these jurisdictions; see discussion *infra.*) *People* v. *Orozco,* 72 Cal. Rptr. 452 (1968); Conn. Gen. Stats. Ann. sec. 7-154 (1958); Ga. Const. (1945) Code Ann. Sec. 2-402; *Jenkins* v. *Jones,* 209 Ga. 758, 75 S.E. 2d 815 (1953); Indiana Ann. Stat. sec. 9-2402 (1956); *Mitsch* v. *City of Hammond,* 234 Ind. 285, 125 N.E. 2d 21 (1955); R.I. Gen. Laws sec. 45-6-6 (1956).

Some other states allow concurrent municipal/state penal laws, but prohibit dual prosecutions. Hawaii Rev. Stats. secs. 706-2, 706-3 (1968); *Territory* v. *Silva,* 27 Hawaii 270 (1923); *People* v. *Sherman,* 45 Misc. 2d 92, 256 N.Y.S. 2d 144 (S.Ct., App. Term, 2d Dept. 1964); Va. Code Ann. sec. 19.1-259 (1950). A similar result is reached by Ky. Const. sec. 168 (1961); *City of Newport* v. *Nier,* 239 S.W. 2d 491 (Ky. App., 1951); *Burnett* v. *Commonwealth,* 284 S.W. 2d 654 (Ky. 1955). Colorado and Minnesota require state criminal procedure to be followed in prosecutions of municipal offenses which are also state offenses; a prohibition against dual prosecution may be inferred. *City of Canon City* v. *Meris,* 323 P. 2d 614 (Colo. 1958); *City of Bloomington* v. *Kossow,* 131 N.W. 2d 206 (Minn. 1964).

The variations amongst the laws of the several states suggest there is no compelling reason for providing dual

prosecutions by city and state. In the absence of such a reason, the plain language of the double jeopardy clause clearly prevents dual prosecutions.

Liaison between prosecutors can result in effective law enforcement in compliance with the double jeopardy rule

Compliance with the double jeopardy rule is, primarily, the responsibility of prosecutors. While courts have been reluctant to interfere with the exercise of prosecutorial discretion, *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F. 2d 479 (1967), they have intervened in instances of clear abuse. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967).

There have been some attempts to establish liaison between federal and state prosecutors, so as to avoid multiple prosecutions of persons who have committed offenses against the federal government and a state. *Petite v. United States,* 361 U.S. 529 (1960); Sigler, Double Jeopardy 177-180 (1969); Miller, Double Jeopardy and the Federal System 117-121 (1968); Va. Code Ann. sec. 19.1-259 (1950).

Liaison should be considerably easier to establish between state and municipal prosecutors, due to the unquestioned supremacy of the state vis-à-vis the municipality. As the Supreme Court of New Jersey noted in *State* v. *Mark,* 23 N.J. 162, 128 A. 2d 487 (1957):

> "(E)ffective orderly procedure dictates the necessity for a working agreement between municipal authorities and the county prosecutor whereby the more serious crimes are tried in the court in which it was intended they should be disposed of, rather than in the mu-

nicipal police court under the charge of disorderly conduct." 128 A. 2d at 490 (dictum).

See also *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617 (1951).

Liaison between municipal and state prosecutors should enable them to decide which will prosecute a single act which violates the laws of each. If a defendant has been arrested by one, and it is later decided he should be prosecuted by the other, the case should be removed to the appropriate court. In case of abuse of the process of holding and transfer, defendants have available remedies of habeas corpus and false arrest. In the event of a dispute between municipal and state prosecutors, the state evidently has paramount authority; if necessary, the state prosecutor should be able to *nolle prosequi* the municipal charge, cf., *United States* v. *Shaw,* 226 A. 2d 366 (D.C. App., 1967), or alternatively to seek a writ of prohibition to prevent the trial from taking place in the municipal court.

We do not suggest these liaison possibilities are constitutional requirements. The constitutional requirement at issue is the rule against double jeopardy. The liaison possibilities are explored here only for the purpose of suggesting that effective law enforcement can be carried out at the same time as the double jeopardy rule is respected.

Historical instances of multiple trials by municipal and state authorities may have been justified at the time, because the state may not have had a reasonable opportunity to intervene before the municipality tried the defendant. However, with the availability of modern communications, and with such organizations as the Florida Bureau of Law Enforcement (recently established pursuant to Florida Statutes (1967) Sec. 23.086 (8), (11)), it is difficult to

imagine a situation where the state would lack a reasonable opportunity to prosecute before a municipal trial.

Petitioner had a constitutionally protected right to compulsory joinder of the municipal and state charges

Throughout the proceedings in this case it has been undisputed that the municipal prosecution for destruction of city property and disorderly breach of the peace was based upon the same act or course of conduct as the state prosecution for grand larceny.

Petitioner was entitled to have all charges "packaged" into a single trial, which should bar any subsequent trial in any court. It was the responsibility of the prosecutors to decide which of them would prosecute petitioner, and in which court. If they had decided to proceed only in the Circuit Court, they would have been obliged to drop the charges for violation of city ordinances, over which the Circuit Court has no jurisdiction. This result is fully compatible with the letter and the spirit of the double jeopardy clause; the effect is to merge the relatively petty municipal offense into the relatively serious state offense.

The Circuit Court could have imposed (and in fact did impose) a sentence of five years' imprisonment for the felony of grand larceny. This was an extremely severe penalty for the conduct of the petitioner. It can hardly be contended that the interests of law and order required the petitioner to be sentenced for the additional 180 days by the municipal court.*

* The three misdemeanor charges originally brought against petitioner on the basis of the same conduct would have necessitated trial in a third court, the Criminal Court of Record, and carried a potential punishment of a total of two more years' imprisonment. The three misdemeanor charges were dropped before going to trial.

As an alternative to compulsory joinder, petitioner had a constitutionally protected right to have the Circuit Court trial barred, under the lesser included offense doctrine

Jurisdictions which recognize prior municipal prosecutions as the equivalent, for double jeopardy purposes, of prior state prosecutions apply the general doctrine of lesser included offense, so as to determine whether a specific municipal prosecution barred a specific state prosecution. *Gavieres* v. *United States,* 220 U.S. 338 (1911); *Randolph* v. *District of Columbia,* 156 A. 2d 686 (D.C. Mun. App., 1959); *Taylor* v. *Curry,* 215 Ga. 734, 113 S.E. 2d 398 (1960); *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617 (1951). This rule should be incorporated in the double jeopardy prohibition as applied to the States.

The established Florida doctrine of lesser included offense, developed in connection with successive trials in state courts, is stated in *Sanford* v. *State,* 75 Fla. 393, 396, 78 So. 340, 341 (1918):

> "If the first information is such that the accused might have been convicted under it on proof of the facts by which the second information is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against trial on the second."

The rule was reiterated in *Wilcox* v. *State,* 183 So. 2d 555, 557 (3d D.C.A., Fla., 1966).

The *Sanford* rule bars the state from re-prosecuting for successively higher offenses arising out of the same transaction. Note, Lesser Included Offenses in Florida, 16 U. Fla. L. Rev. 341, 352 (1963).

The information for grand larceny filed by the State Attorney on January 18, 1967 (App. 4a) is in the following terms:

> "one painting, of a value in excess of $100.00, lawful money of the United States of America, a more particular description of which painting is to the State Attorney unknown, of the goods, chattels and property of the City of St. Petersburg, Florida, a municipal corporation, then and there being found, did feloniously steal, take and carry away . . ."

These same allegations, if proved, could form the basis of a conviction under sec. 25.14 of the St. Petersburg Code (1963) which provides, in material part (App. 12a):

> "It shall be unlawful for any person maliciously or wilfully to destroy, mutilate, injure or deface any of the public buildings . . . or other property of the city. . . ."

There is no record of the testimony introduced at the municipal court trial. Petitioner was present in person, and subsequently executed an affidavit that to the best of his knowledge and belief, the prosecution instituted in the Circuit Court was based on the identical conduct as had been at issue in the municipal court (App. 15a-16a).

The *Sanford* rule bars the State from re-prosecuting, after the city prosecution of a lesser-included offense. Moreover, the District Court of Appeal, in affirming the judgment and sentence of the Circuit Court, assumed, without deciding, that the municipal offenses were included within the state felony of grand larceny.

II.

The State of Florida violated the Fourteenth Amendment to the Constitution of the United States when the trial court pronounced sentence upon petitioner on the basis of a pre-sentence investigation report to which petitioner was denied access; a similar violation occurred when the District Court of Appeal of Florida affirmed the sentence after the trial court had denied petitioner's request to have the report included in the record on appeal.

A. *In denying petitioner's request for discovery of the report before sentencing, the trial court violated petitioner's rights to fair trial, confrontation of witnesses and assistance of counsel.*

This Court has held that a sentencing judge may refer to the information contained in a pre-sentence investigation report. *Williams* v. *New York,* 337 U.S. 241 (1949); *Williams* v. *Oklahoma,* 358 U.S. 576 (1959). Some of this Court's opinions strongly suggest that a defendant has a constitutionally protected right to examine and rebut the report. *Specht* v. *Patterson,* 386 U.S. 605 (1967); *Kent* v. *United States,* 383 U.S. 541 (1966); *Townsend* v. *Burke,* 334 U.S. 736 (1948). However this Court has not ruled directly on the point.

It is fundamental that a party appearing before a court or other tribunal is entitled to know what evidence is being used. *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292 (1937); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *California,* 380 U.S. 415 (1965). Furthermore, petitioner had a fundamental right to address

the trial court before pronouncement of sentence. *Anonymous,* 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689); *Green* v. *United States,* 365 U.S. 301 (1961); *State* v. *Laird,* 85 N.J. Super. 170, 204 A. 2d 220 (1964). This right was illusory indeed since petitioner did not know what information was before the court in the pre-sentence investigation report.

Without access to the report, petitioner had no opportunity to correct errors or omissions. The severity with which petitioner was treated by the trial court, both at the time of sentencing and in later proceedings concerning release on bond pending appeal, suggests that the pre-sentence investigation report may well contain scandalous matter prejudicial to petitioner.*

Some states recognize a defendant's right to discovery of the contents, but not necessarily identification of the sources of information, of any pre-sentence investigation report used by the court. Alabama Code, title 42, sec. 23 (1958); *Poole* v. *State,* 44 Ala. App. 169, 204 So. 2d 564 (1967); Calif. Penal Code, sec. 1203, 1203.01 (1969 Supp.);

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* First, the trial court imposed the maximum sentence for grand larceny, in a situation where the grand larceny charge was somewhat far-fetched. Second, he refused to release petitioner on bond pending appeal, and was reversed by the District Court of Appeal, Second District, reported as *Waller* v. *State,* 208 So. 2d 147 (2d D.C.A., Fla., 1968). Third, he again denied release on bond after the ruling by the District Court of Appeal, and was reversed by the Supreme Court of Florida (App. 57a). As reported in the St. Petersburg Times, November 20, 1968, p. 6B: "(Judge) Phillips denied Waller access to bail Oct. 5, labeling the action 'a benefit to society.' The State Supreme Court on Nov. 12 reversed Phillips and ordered him to reinstate Waller's $2,500 bond. . . ." The proceedings in the Supreme Court of Florida concerning petitioner's release on bond pending appeal appear *in extenso* in the record of this case (R. Fla. S. Ct.—items 3, 4, 6, 7 and 8).

State v. *Gullette*, 3 Conn. Cir. 153, 209 A. 2d 529 (1964); *State* v. *Rolfe*, 92 Idaho 467, 444 P. 2d 428 (1968); *Green* v. *State*, 247 A. 2d 117 (Maine, 1968); Mass. Ann. Laws, ch. 279, sec. 4A (as amended, 1968); cf. *Commonwealth* v. *Martin*, 244 N.E. 2d 303 (Mass. 1969); Minn. Crim. Code, sec. 609.115(4) (1963); *Kuhl* v. *District Court*, 139 Mont. 536, 366 P. 2d 347 (1961); *State* v. *Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962)—cf. N. C. Gen. Stats., sec. 15-207 (1965); *State* v. *Willms*, 117 N.W. 2d 84 (N.D. 1962)—subject to special qualifications; Ohio Rev. Code, sec. 2947.06 (1968 Supp.); *State* v. *Vance*, 117 Ohio App. 169, 191 N.E. 2d 737 (1962)—cf. Ohio Rev. Code, sec. 2951.03 (1968 Supp.); *State* v. *Simms*, 131 S.C. 422, 127 S.E. 840 (1925); Va. Code Ann., sec. 53-278.1 (1967); *Linton* v. *Commonwealth*, 192 Va. 437, 65 S.E. 2d 534 (1951); Utah Code Ann., secs. 77-35-12, 13 (1953).

At the opposite extreme, Florida requires the court to keep the report confidential. *Morgan* v. *State*, 142 So. 2d 308 (2d D.C.A., Fla., 1962). Delaware has a similar rule, subject to relaxation in special circumstances. *State* v. *Moore*, 108 A. 2d 675 (Del. Super. 1954).

Still other states take an intermediate position, leaving the trial court with full discretion either to disclose or not to disclose the report. *State* v. *Scanlon*, 104 Ariz. 187, 450 P. 2d 377 (1969); *State* v. *Delano*, 161 N.W. 2d 66 (Iowa, 1968); Maryland Rules Proc., rule 761d (1957); *Costello* v. *State*, 237 Md. 464, 206 A. 2d 812 (1965); *People* v. *Camak*, 5 Mich. App. 655, 147 N.W. 2d 746 (1967); *People* v. *Peace*, 18 N.Y. 2d 230, 273 N.Y.S. 2d 64, 219 N.E. 2d 419 (1966), cert. den. 385 U.S. 1032; *In re Baldwin*, 126 Vt. 442, 234 A. 2d 434 (1967); *Waddell* v. *State*, 24 Wis. 2d 364, 129 N.W. 2d 201 (1964).

Before adoption of the 1966 Amendments to the Federal Rules of Criminal Procedure, there was conflict amongst the federal courts of appeal. The defendant's right to discovery of the pre-sentence investigation report was recognized by *Stephan* v. *United States*, 133 F. 2d 87 (CA 6, 1943), *cert. den.* 318 U.S. 78, and by *Smith* v. *United States*, 223 F. 2d 750 (CA 5, 1955). Other circuits left the matter within the discretion of the trial court. *Powers* v. *United States*, 325 F. 2d 666 (CA 1, 1963); *Friedman* v. *United States*, 200 F. 2d 690 (CA 8, 1952).

Adoption of Rule 32(c)(2), providing that federal courts may disclose all or part of the pre-sentence investigation report to defendant or his counsel, has led to a uniform practice amongst the circuits, all holding that the trial court has full discretion either to disclose or not to disclose. *United States* v. *Fischer*, 381 F. 2d 509 (CA 2, 1967); *United States* v. *Weiner*, 376 F. 2d 42 (CA 3, 1967); *Baker* v. *United States*, 388 F. 2d 931 (CA 4, 1968); *Roeth* v. *United States*, 380 F. 2d 755 (CA 5, 1967); *United States* v. *Trigg*, 392 F. 2d 860 (CA 7, 1968), cert. den. 391 U.S. 961; *Cook* v. *Willingham*, 400 F. 2d 885 (CA 10, 1968).

Disclosure of the pre-sentence investigation report to the defendant or his counsel has been recommended by the Model Penal Code, sec. 7.07 (1962); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, sec. 4.4 (Tentative Draft, 1967); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, sec. 2.3 (Tentative Draft, 1967); Model Sentencing Act, sec. 4 (1963); Amendments to Federal

Rules of Criminal Procedure, Dissenting Statement by Douglas, J., 383 U.S. 1089, 1092-1093 (1966); and numerous legal scholars. See Bach, The Defendant's Right of Access to Presentence Reports, 4 Crim. L. Bull. 160 (1968).

Florida's rule of secrecy is so far out of the mainstream of practice and theory in the United States, one must conclude that it violates constitutionally protected rights.

B. *In affirming the sentence without requiring inclusion of the report in the record on appeal, the District Court of Appeal of Florida failed to provide adequate review and thereby denied petitioner's right to due process.*

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) this Court held that a trial judge imposing a more severe sentence upon a second trial than at the first must express the factual basis of the increased sentence. One obvious purpose of this rule is to enable the appropriate appellate court to review the trial court's exercise of sentencing discretion, at least in this special type of situation.

Pearce therefore stands as a rule, not only addressed to the trial court requiring an explanation of the sentence, but also expressed to the appellate court requiring an evaluation of the sentence in the light of the explanation given. An appellate court that fails to meet its obligation under this rule commits its own violation of the due process rights of the defendant.

Pearce exemplifies the increasing recognition that a defendant needs as much protection during the sentencing process as during earlier parts of his trial. This protection is of little value unless the sentencing discretion of

the trial court can be subjected to meaningful appellate review. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tentative Draft, 1967); Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand. L. Rev. 671 (1962); Appellate Review of Sentences: Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249 (1962). Without access to the pre-sentence report in this case, petitioner had no opportunity to obtain appellate review of the trial court's exercise of its sentencing discretion.

CONCLUSION

For the reasons stated above, this Court should quash the information for grand larceny, vacate the judgment and sentence rendered below by the Circuit Court, and order petitioner discharged.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

NO. 24

JOSEPH WALLER, JR.,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF THE RESPONDENT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CITATIONS, continued

CITATIONS, continued Page

CONSTITUTION

STATUTES

RULES

CODE

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BRIEF OF THE RESPONDENT

OPINIONS BELOW

Respondent concedes that the opinions involved below are those represented by petitioner in his brief at page one thereof.

JURISDICTION

Respondent concedes that this Court had jurisdiction to

consider this matter pursuant to 28 USC, § 1257 (3) and that the matter was timely brought to it for such action as it elected to take.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concedes that, depending upon the outcome, it well may be accurate that the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution may be here involved.

It is possible that Section 12 of the Declaration of Rights of the Constitution of the State of Florida (1885) may be involved just as Article I, Section 9, of the 1968 revision thereof may be involved.

Certainly Section 811.021, Florida Statutes, is involved since it formed the predicate for petitioner's felony conviction of larceny.

Sections 25.14 and 25.15 of the municipal code of the city of St. Petersburg, Florida, are likewise (if only tangentially) probably involved.

QUESTIONS PRESENTED

Respondent accepts the questions presented as posed by petitioner in his brief at page six thereof.

STATEMENT OF THE CASE

The statement of the case presented by petitioner in his brief at pages six through ten is a reasonably accurate summary of the various steps taken below and is therefore accepted.

SUMMARY OF ARGUMENT

Petitioner's complaint, whether viewed in light of *BENTON v. MARYLAND*, 395 U. S. 784 (1969), or the general principles which preceded it simply cannot support a claim of double jeopardy since the predicate for the same crime or offense does not exist.

If his quarrel is based on the principle of collateral estoppel or *RES ADJUDICATA*, then neither of the doctrines, however viewed, are entitled to status as a constitutional mandate.

The availability of the presentence investigation report is or should be a matter within the appropriate procedural controls of the courts of the several states. Not unlike the reason why *McNABB v. U.S.*, 318 U.S. 332, 340, 87 L.ed. 819, 63 S.Ct. 608, reh den 319 U.S. 784, 87 L.ed. 1727, 63 S.Ct. 1322, has not been impressed upon the several states as a constitutional requirement so the disposition made by the court of a P.S.I. report should not be constitutionally ordained.

We do not require the identity of a confidential informant to be disclosed except in the most compelling of circumstances-- just as a federal judge today may, pursuant to rule, withhold making available his P.S.I. report. If he need not, then we know of no basis upon which it either could or should

be urged that making such a report available in the several state courts is a constitutional must.

ARGUMENT

POINT I

A. Lest there be any quarrel with what this Court's position may be with regard to whether the Fifth Amendment proscription against double jeopardy is made applicable to the states by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution, respondent concedes that as of the date that it rendered its decision in *BENTON v. MARYLAND,* 395 U.S. 784 (1969), that is now the national rule.

Respondent would add, however, that petitioner seems to say that this Court has now, by virtue of what it did in *BENTON,* supra, declared itself open for any complaint with regard to double jeopardy.

In truth and fact, as we read *BENTON,* supra, what this Court said, meant and did was simply to judicially proclaim that thereafter anyone so aggrieved could come to this Court with such a complaint from any one of the fifty states which themselves did not, by law, rule or decision, proscribe double jeopardy.

Said another way, *BENTON,* supra, did not become a second laundry for a simple complaint that a state court should have held for one complaining regarding double jeopardy but

rather that such persons who could not complain of it now had the supreme forum in which to lodge it. Really all that was done was to put the capstone of a constitutional mandate on the principle which most states already had. Indeed, that was the case with the colonies long before the federal government breathed its first.

In that sense, it may be safely said that for our purposes, the decision of this Court in *BENTON*, supra, is not to be applied retroactively but that even if it is, it is simply the supreme restatement of already well-established principles. The question will redound until resolved--if this is so, has petitioner demonstrated that his circumstances place him within the protective pale of either *BENTON*, supra, or the principles pursuant to which it might have been reviewed in other circumstances?

This is best exemplified by the fact that Florida preceded the federal government's strict view of unreasonable searches and seizures by some two years and yet cases involving that question were entertained and reversed by this Court before its decision in *MAPP v. OHIO*, 367 U.S. 643, 6 L.ed.2d 1081, 81 S.Ct. 1684, which, for the first time, articulated the principle that the proscription against unreasonable searches and seizures in the federal constitution was being made applicable to the state via the due process clause of the Fourteenth Amendment.

Therefore, *BENTON*, supra, is not new magic but is rather a view into the manner in which it will hereafter be viewed by this tribunal. Indeed, how in the name of heaven could *BARTKUS v. ILLINOIS*, 359 U.S. 121 (1959), *ABBATE v. UNITED STATES*, 359 U.S. 187 (1959), and such other cases have even been considered by this Court (regardless of the outcome) without *BENTON*, supra, as their predicate if the above conclusion is not so. One must therefore inquire: must *BARTKUS*, supra, be reconsidered in light of *BENTON*, supra, or does it stand unless and until reversed for some other reason?

B. Here petitioner's complaint seems to be that since there cannot be a claim of separate sovereigns such as the state and the federal government in a situation where the prosecutions are respectively in a municipal court and a state court, that avenue of securing this Court's judicial approval is not available to respondent. He cites us to the decision rendered by this Court in *REYNOLDS v. SIMS*, 377 U.S. 533 (1964), where, in an attempt to defeat a claim for one man, one vote (more nearly fair apportionment) was sought to be advanced by Alabama using the national congress as a comparison. We all know of the outcome of that argument and especially in the State of Florida - see *SWANN ET AL. v. ADAMS*, 385 U.S. 440, 17 L.ed.2d 501, 87 S.Ct. 569, yet one must wonder at the bona fides of the conclusion rejecting such an argument. Indeed what is there to be said with regard to all those states which were admitted to the union after the establishment of the federal government? Suppose tomorrow Puerto Rico were to seek statehood--could it be said of Puerto Rico thereafter that she had a hand as a state in permitting the federal government to come into being or would it have to be said that she had absolutely nothing whatsoever to say about it and that she was being suffered membership in our republic by the federal government? Very much the same, respondent contends, as the relationship which admittedly exists between the State of Florida and its several municipalities.

Petitioner has neither misled nor incorrectly stated the status of municipalities--they are creatures of the Legislature.

Obviously an individual convicted in a municipal court in Florida has not been convicted of a crime or indeed an offense.

A crime in Florida is either a felony or a misdemeanor, the only difference being the place of confinement. Certainly it could never be argued that any municipality in the State of Florida, since they had existence, makes criminal any violation of its ordinances. Indeed, this very Court in *DUNCAN v. LOUISIANA*, 391 U.S. 145 (1968), concluded that municipal violations were petty offenses and not crimes. Therefore, petitioner has certainly not been placed twice in jeopardy for the same crime. Just as certainly does it follow that he has not been placed in jeopardy twice for the same offense. If anything, he was placed on trial in different forums for three independent acts, one of which was a crime (felony) in violation of Section 811.021, Florida Statutes. It may be true that the action taken by petitioner which resulted in the matter about which he complains was part of one transaction but it is absolutely incorrect to claim that it was one act for which he has been made to pay twice.

Adverting to the principle of separate sovereigns, one cannot approach the issue without considering that the bulk of jurisdictions in this country have adhered to the principle of separate sovereigns for purposes of determining whether jeopardy was single or double. They are: ALABAMA, *PERRY v. CITY OF BIRMINGHAM*, 1956, 88 So.2d 577, cert den 88 So.2d 580; CALIFORNIA, *PEOPLE v. RODRIGUEZ*, 1962, 20 Cal. Reptr. 556; GEORGIA, *TAYLOR v. CURRY*, 1960, 215 Ga. 734, 113 S.E.2d 398; ILLINOIS,*CITY OF CHICAGO v. LORD*, 1954, 3 Ill. App.2d 410, 122 N.E.2d 439, affirmed 130 N.E.2d 504; KANSAS, *CITY OF GARDEN CITY v. MILLER*, 1957, 181 Kan. 360, 311 P.2d 306; MINNESOTA, *STATE v. END*, 1950,45 N.W.2d 378; MISSOURI, *STATE v. GARNER*, 1950, 226 S.W.2d 604; NEW JERSEY, *STATE v. REID*, 1952, 19 N.J. Super. 32,87 A.2d 562; MISSISSIPPI, *BELL v. STATE*,

1965, 170 So.2d 428; NEBRASKA, *STATE v. AMICK*, 1962, 173 Neb. 770, 114 N.W.2d 893; OKLAHOMA, *McCANN v. STATE*, 1940 82 Okl. Cr. 374, 170 P.2d 562; SOUTH CAROLINA, *STATE v. BUTLER*, 1956,94 S.E.2d 761; TENNESSEE, *MULLINS v. STATE*, 1964, 380 S.W.2d 201; WYOMING, *STATE v. JACKSON*, 1955, 291 P.2d 798.

Respondent agrees that some states, such as Colorado, do not follow the majority and that some, such as Virginia, have passed statutes making a conviction under a municipal ordinance or state law a bar to subsequent prosecution under another statute or ordinance. Florida does not have that situation and therefore the matter must be measured in its cold, unadorned status.

Petitioner tells us that the proscription against double jeopardy requires that a defendant be prosecuted no more than once on the basis of a single act or course of conduct. Indeed! As we read the proscriptive legislation, it is directly geared to the word "offence". If petitioner means to say that what he meant was that is how it should be interpreted, then at least we can understand his claim but presently there is a wealth of difference between the word "offence" and "act" or "course of conduct". In short, he wants this Court to reject the word "offence" in the national constitution and insert in its stead the work "act" or the words "course of conduct"--otherwise known as the single transaction test. Well, of course, this Court must consider whether that is really what the national congress had in mind when it drafted the amendment and what the people voted into being.

We are next told that the simple solution to the problem is a mandatory joinder of charges which could have been brought by either sovereign. That may be so, but not in this case simply because hindsight cannot now provide us with what he contends *BENTON*, supra, said some time later. Our courts had no idea that *BENTON*, supra, would be forthcoming but even if they did, it would have been impossible in Florida for any one court to have marshalled the three charges against petitioner, prosecuted and sentenced him. Therefore, we are structurally unable to do so--jurisdictional lines being what they are.

Alarmingly enough what petitioner tells us is that if we put aside the jurisdictional barriers that would make such a composite trial impossible in Florida, he could not be heard to complain had all three charges been brought against him in one court. It is alarming because if he says and means this, neither of the two municipal charges could have been lesser and included. This is really, in the last analysis, the most stunning effect of his position in that he would have wound up with at least the same fate and with at least the tacit approval of both *BARTKUS*, supra, and *ABBATE*, supra. Would it make any difference to petitioner that he sat in a state penal compound for a single "act" or "course of conduct" or in a city compound for two of them and in a state compound for the third? We rather doubt it. By the way, there is simply no fashion by means of which he can maintain the argument of a single act or course of conduct or admit that had it been brought in one court there would have been no jeopardy transgression. If there is a transgression, it would be there without regard to the procedure by means of which he was charged and convicted. In other words, are we going to revisit *BARTKUS*, supra, and *ABBATE*, supra, or are we going to do something less?

It almost must follow that petitioner cannot really be talking about double jeopardy as it must have been considered many years ago. Respondent considers that what he must be making reference to is the doctrine of either collateral estoppel or *RES ADJUDICATA*. There is simply not the same offense or offenses involved in the matter before the Court so it must be this something else. The only thing it can be is either of those two. Assuming our assessment to be accurate, respondent contends that neither doctrine, in the posture of this case (since we have no statute such as that involved in the case of *IN RE MARTINIS*, 244 N.Y.S.2d 949) can be applicable to a criminal proceeding in Florida.

Respondent contends that there are several reasons why the respective doctrines of either collateral estoppel or *RES ADJUDICATA* cannot be applied to criminal prosecutions.

(1) It would be doubtful at best whether the estoppel could apply against petitioner and there is signally lacking the mutuality of estoppel.

(2) Neither the state nor a municipality in Florida is able to appeal from a verdict in favor of a given defendant no matter how erroneous it may be. While such an acquittal stands as an absolute bar to a further proceeding thereon, it would be a gross injustice if such an erroneous verdict could work as an estoppel in the prosecution for the commission of a separate and distinct crime. Certainly no one will quarrel with the principle that neither the doctrine of *RES ADJUDICATA*, collateral estoppel or estoppel by judgment will be applied where it will result in an injustice.

(3) The foregoing is considerably aggravated when we remember that the state may not compel one so charged to give discovery because of his constitutional privilege against

self-incrimination--not so in a purely civil action where discovery is mutual and the doctrines have been extant for many years.

(4) The state has an infinitely greater burden of proof than does a civil litigant.

(5) To apply such a doctrine as a constitutional mandate would result in the arbitrary over-weighing of the particular verdict rendered rather than a detailed regard to the particular evidence introduced.

(6) It would hopelessly confuse the entire body of law in those states which do not have statutory proscriptions against subsequent prosecutions but rather treat the matter on the principle of double jeopardy, vis-a-vis the same offense. We say this because we would have to thereafter determine what constituted a course of action in a criminal case. Were the parties the same? Were the issues the same? Was the proof in one exactly the proof in the other? If this would ultimately result in there being no difference in a course of action and an offense, then who needs it since it is the same as double jeopardy.

(7) The application of such doctrines would encourage multiple crimes at or about the same time since an adjudication of one would be conclusive of all the others.

(8) Most of the complaint regarding multiple prosecutions is that a given court is really wearing out a defendant more than anything else. In light of the revolution in the criminal law and the vast expansion of the rights guaranteed to a criminal defendant, this is, at best, unlikely since the state must supply a given defendant with the means by which to prepare a defense. To this extent, certainly such an argument is hardly compelling. We do add here that since the petitioner committed the multiple acts, he is hardly in a position to seek

equity. The doctrines of collateral estoppel and *RES ADJUDICATA* are both doctrines based upon equity.

Though not in any sense a parallel to the situation at bar, the case of *HOTEMA v. UNITED STATES*, (1902), 186 U.S. 413, 46 L.ed. 1225, 22 S.Ct. 895, was at least tacit recognition by this Court of the fact that double jeopardy, when involving multiple victims was not going to be made available to a complainant suffering individual prosecutions. There this Court rejected a plea of double jeopardy, observing that Hotema had been charged with the murder of three different persons on the same day. The Court considered that it did not matter that he had been acquitted with regard to one victim, the jury was hung as to another and convicted him as to the third. If that result could follow, and it did, then who can here quarrel with what the outcome would be? Terminally, even if we assume that a modified jeopardy argument under collateral estoppel might prove appealing to this Court, it is suggested that there is no present basis upon which the theory could earn a constitutional mandate from this Court in a criminal prosecution. This is so even if we consider the case of *SEALFON v. U.S.*, 332 U.S. 575, 92 L.ed. 180, 68 S.Ct. 237, which, some might say, represents a sort of application of that theory to a criminal case. We contend that it was nothing of the kind since it only dealt with the question of whether one acquitted of a charge of conspiracy to defraud the United States may thereafter be prosecuted for the substantive crime. Even if that is put aside, there is no basis upon which it should reach constitutional proportions but should instead simply be a procedural matter left to the courts of the several states. In short, respondent opts for the proposition that it should enjoy no greater stature here than does *McNABB v. U.S.*, 318 U.S. 332, 340, 87 L.ed. 819, 63 S.Ct. 608, rehearing den 319 U.S. 784, 87 L.ed. 1727, 63 S.Ct. 1322. If *McNABB*, supra, has nothing to do with proceedings in the several states then no principle, not even that which might be considered under the theory in *SEALFON*, supra, should make collateral estoppel applicable here. In short,

the doctrine of collateral estoppel should be considered as little more, if anything, than a procedural control and not a constitutional mandate to throttle the several states. See *ABBATE v. U.S.*, supra.

POINT II

Respondent cheerfuly concedes, under this point, that this Court has held that a sentencing judge may refer to the matters contained in a presentence investigation report. *WILLIAMS v. NEW YORK*, 337 U.S. 241 (1949), and *WILLIAMS v. OKLAHOMA*, 358 U.S. 576 (1959).

Petitioner, with a similar degree, admits that the court below was quite in accord with Florida law when it declined to make the presentence investigation report available to him. In so doing, it acted within the scope of *MORGAN v. STATE*, Fla., 142 So.2d 308, which has long been the law in Florida and indeed is the position assumed by other states. Certainly there are a host of jurisdictions (cited by petitioner) which take his view. There are almost as many which take the middle road, leaving the matter one of discretion with the trial court.

Respondent is quite aware of what the American Bar Association Committee on the Implementation of Minimum Standards for Criminal Justice hopes to do with Section 2.3 thereof relating to appellate review of sentences since the writer is the deputy chairman of that committee in Florida. But we are not talking about what one day may be as much as we are about what has been and whether so having been it violates a constitutional provision. If, under the recent adoption of Rule 32 (c) (2) of the Federal Rules of Criminal Procedure, the trial court is allowed discretion in whether to disclose presentence reports, then surely Florida's rule, a la *MORGAN*, supra, cannot be constitutionally tainted.

There is yet an additional reason why no constitutional infirmity either does or should exist in the practice followed in Florida. Florida has long followed the practice of not reviewing sentences so long as that which was imposed was within the limits prescribed by the law violated. Certainly the term of six months to five years for the crime of larceny is well within the penal provisions of Chapter 811, Florida Statutes. Assuming that it is otherwise not illegal, it is not a matter which will be reviewed on appeal. See *DICKINSON v. STATE*, Fla., 170 So.2d 594.

Whatever view one may take of the wisdom which forms the predicate for the several views held in the several jurisdictions dealing with the matter, there are compelling reasons why the matter should not and need not be made available to defendants.

Primary, among them, is the fact that no portion of the presentence investigation report goes to the question of guilt or innocence. Just as the *voir dire* examination in *WITHERSPOON v. ILLINOIS*, 20 L.ed 2d 776, did not, in this Court's view, upset the conviction. Therefore, if there was hearsay in it or matters which ordinarily would not have been put before the jury, that reason has no existence at this stage of the trial. If the trial judge could have sentenced petitioner as he did with or without a presentence report, then respondent submits that it matters not at all that he did not make the contents of such a report available to defendant.

Yet another reason is that the fear of allowing extraneous matter to allegedly work untoward harm on him is quite unjustified. We keep hearsay and other matters concerning one's guilt or innocence away from the jury because they are

not equipped to assess it in light of its source. Not so with a judge who is seldom, if ever, prey to such failings. He knows hearsay for what it is and lends it only so much value as it may earn in the aggregate report. He is as cautious of hearsay as he needs to be when he sustains objections to testimony attempting to introduce it. Therefore he need not be lectured or cautioned as to what, if anything, should be done with regard to hearsay matters.

The third reason is that it must at once be obvious as to why the contents of the report should not be made available. Were we to do this, then defense counsel or their clients or their friends would be inclined to at least cause embarrassment among those who spoke ill of them when interrogated by the people conducting the investigation. Just as soon as this had happened a handful of times, the very well-spring of information that at least provides some insight to the judge would have run dry. We must protect those people from the harassment which would have to follow. There is nothing novel in this. It is done every day in virtually every jurisdiction of the land when the question of whether to disclose the identity of a confidential informant is raised. It is only when the testimony and identity of the informant is critical to prove guilt of the crime charged that any court has ever held that he must be disclosed. Hardly the situation here with the presentence report. Almost all courts agree that the identity of the informant as law enforcement's handmaiden must be protected unless critical to the case.

Nothing here could be said to be critical to the matter of petitioner's guilt--since that had already been established without the report or whatever it may have contained. All that was left was to sentence him. The judge did so well within the limits prescribed by Florida law and we note that the sentence is patently not illegal, with or without the benefit of a presentence investigation report. No matter what the report contained, it could not have resulted in any sentence being

imposed against him greater than that which Florida law allows. Conversely, even if petitioner had been able to examine the presentence report closely and show that some of the matters were at least incorrect or at least the conclusions wrong, the judge could have idly put it by and sentenced him anyway. Therefore, it seems to follow that to place the matter on the level of a constitutional mandate would be to raise the stream above the river. Hardly a desirable conclusion as viewed by respondent.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to petitioner's counsel, the Honorables Leslie Harold Levinson, 2925 N.W. 12th Place, Gainesville, Florida 32001; Melvin L. Wulf, 156 Fifth Avenue, New York, N. Y. 10010; and Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, by mail, this _____ day of October, 1969.

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Of Counsel for the Respondent.

FILE COPY

IN THE

Supreme Court of the United States

NO. 24

OCTOBER TERM, 1969

JOSEPH WALLER, JR.,

Petitioner.

—vs—

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

EARL FAIRCLOTH
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TABLE OF CITATIONS

Page

CASES

RULES

IN THE

Supreme Court of the United States

NO. 24

OCTOBER TERM, 1969

JOSEPH WALLER, JR.,

Petitioner,

—vs—

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

Comes now the State of Florida, respondent in the above-styled cause, pursuant to Rule 59 (2), as amended in 1967, and petitions the Court for rehearing in the cause and for reason therefor would show as follows:

This court rendered its decision in the above-styled cause on April 6, 1970. This petition is filed well within the 25 day requirement so as to confer jurisdiction on this Court in order that it might consider the matter.

Though styled a petition for rehearing, the matter actually sought to be put to this Court is one in which respondent requests either modification or clarification of the dispositional portion of the Court's decision, to-wit:

> "The second trial of petitioner which resulted in a judgment of conviction in the state court for a felony having no valid basis, that judgment is vacated and the cause remanded to the District Court of Appeal of

Florida, Second District, for further proceedings in accord with this opinion."

From the above quoted portion of this Court's decision, one well might gather that petitioner is to be discharged after the Second District Court of Appeal of Florida vacates the judgment pursuant to this Court's mandate should it issue as presently intended.

This can hardly be the intended result in light of the fact that the District Court of Appeal in and for the Second District of Florida bottomed its decision exclusively on the separate sovereign theory (see Thiesen v. McDavid, 34 Fla. 440, 16 So. 321) which this Court unanimously rejected in the case.

There has never been a holding by the Second District Court of Appeal of Florida that the two municipal violations (1) destruction of city property and (2) disorderly breach of the peace, are lesser and included offenses of the felony of grand larceny.

The predicate for this Court's decision was its decision in Grafton v. U. S., 206 U.S. 333 (1907) from which it was concluded that the separate sovereign theory had to fall for the reasons enunciated therein. Terminally, this Court's decision was that the dual sovereign theory was an anachronism which it would no longer abide. However, this result would only apply if and when the two municipal violations already referred to were in fact lesser and included offenses of the felony of grand larceny.

It would be inappropriate for this Court to decide whether they were in fact so included inasmuch as this is a question of state law and not of constitutional principle. If they are not lesser and included offenses, then the question of jeopardy may not be disposed of, as it seems to have been done in the

case at bar, by ordering the judgment vacated. It is not enough to assume that they are lesser and included if in fact under Florida law they cannot be so characterized. It further would seem to follow that if, as respondent submits, they are not lesser and included offenses, then the dispositional portion of this Court's decision could have no meaningful application based upon the theory of separate sovereigns.

Moreover, it is certain that the decision here could not have been bottomed on the single transaction theory. The Court's specific holding in Ashe v. Swenson, No. 57, Oct. Term 1969, Opinion rendered April 6, 1970, is very pointedly bottomed on the principle of collateral estoppel and nothing else; with the Chief Justice dissenting, and specifically rejecting the "single frolic" theory. In light of those views expressed by the Chief Justice in Ashe, supra, the respondent respectfully suggests that the single transaction theory could not have been the rationale for the opinion in this case.

Because it is obvious that jeopardy, in light of the opinion in the case at bar, could only be said to have attached if and when those municipal violations are determined to be lesser and included offenses of grand larceny, it is respectfully submitted that the matter should be remanded to the District Court of Appeal in and for the Second District of Florida so as to determine that very question. It well may be that, if they are separate and distinct offenses, this Court might conclude that some disposition of petitioner's claim, other than vacating the judgment, should be made. A remand under the presently worded disposition could result in only one decision of the Second District Court and that would be to discharge petitioner from the judgment. Since that has been demonstrated to be a non sequitur in terms of the theory of separate sovereigns, an amended decision with regard to the disposition to be made by the Second District Court of Appeal should and ought to be rendered.

This petition does not seek a reversal of this Court's opinion but rather seeks clear directions in order that the Second District Court will know what should or may be done with the matter on remand. Therefore, this Court could, with consistency, deny this petition for rehearing and yet remand the matter in order that the Second District Court might decide the critical question or whether the two municipal violations were in fact lesser and included offenses of grand larceny. See Securities and Exchange Commission v. Drexel & Co., 349 U.S. 910, 913; Slochower v. Board of Higher Education, 351 U.S. 944; and Union Trust Co. v. Eastern Air Lines, 350 U. S. 962.

WHEREFORE, respondent respectfully moves the Court to grant so much of the petition for rehearing as is consistent with the argument made therein.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

WILLIAM D. ROTH
Special Assistant Attorney General

Counsel for the Respondent.

I hereby certify that the foregoing Petition for Rehearing is presented for this Court's consideration in good faith and not merely for delay.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Petition for Rehearing to petitioner's counsel, the Honorables Leslie Harold Levinson, 2925 N. W. 12th Place, Gainesville, Florida 32001; Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010; and Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, by mail, this _____ day of April, 1970.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1969

Joseph Waller, Jr., Petitioner, v. State of Florida. | On Writ of Certiorari to the District Court of Appeal of Florida, Second District.

[April 6, 1970]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ in this case to review a narrow question which can best be treated on the basis of the facts as stated by the District Court of Appeal of Florida, Second District, and the holding of that court. Petitioner was one of a number of persons who removed a canvas mural which was affixed to a wall inside the City Hall of St. Petersburg, Florida. After the mural was removed, the petitioner, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers. After a scuffle, the officers recovered the mural, but in a damaged condition.

The petitioner was charged by the City of St. Petersburg with the violation of two ordinances: first, destruction of city property; and second, disorderly breach of the peace. He was found guilty in the municipal court on both counts, and a sentence of 180 days in the county jail was imposed.

Thereafter an information was filed against the petitioner by the State of Florida charging him with grand larceny. It is conceded that this information was based on the same acts of the petitioner as were involved in the violation of the two city ordinances.

Before his trial in the Circuit Court on the felony charge, petitioner moved in the Supreme Court of Florida for a writ of prohibition to prevent the second trial, asserting the claim of double jeopardy as a bar. Relief was denied without opinion. *Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County*, 201 So. 2d 554 (Fla. 1967). Thereafter petitioner was tried in the Circuit Court of Florida by a jury and was found guilty of the felony of grand larceny. After verdict in the state court, he was sentenced to six months to five years less 170 days of the 180-day sentence previously imposed by the municipal court of St. Petersburg, Florida.

On appeal, the District Court of Appeal of Florida considered and rejected petitioner's claim that he had twice been put in jeopardy because prior to his conviction of grand larceny, he had been convicted by the municipal court of an included offense of the crime of grand larceny. *Waller* v. *State*, 213 So. 2d 623 (Dist. Ct. App. Fla. 1968). The opinion of the District Court of Appeal first explicitly acknowledged that the charge on which the state court action rested "was based on the same acts of the appellant as were involved in the violation of the two city ordinances." Then, in rejecting Waller's claim of double jeopardy the court said:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has not twice been put in jeopardy, because *even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.* This has been the law of this state since 1894, as is established in the case of *Theisen* v. *McDavid*, 34 Fla. 440, 16 So. 321. . . . The Florida Supreme

Court has followed the *Theisen* case, *supra*, throughout the years and as recently as July 17, 1968, in *Hilliard* v. *City of Gainesville, Florida*, 213 So. 2d 689 [(Fla. 1968)], reaffirmed the *Theisen* case . . . .

" 'This double jeopardy argument has long been settled contrary to the claims of the petitioner. We see no reason to recede from our established precedent on the subject. Long ago it was decided that an act committed within municipal limits may be punished by city ordinance even though the same act is also proscribed as a crime by a state statute. An offender may be tried for the municipal offense in the city court and for the crime in the proper state court. Conviction or acquittal in either does not bar prosecution in the other.' " (Emphasis added.)

A petition for a writ of certiorari to the Supreme Court of Florida was denied, *Waller* v. *State*, 221 So. 2d 749 (Fla. 1968). It is reasonable to assume that the Florida trial court and the District Court of Appeal considered themselves bound by the doctrine of *Theisen* v. *McDavid*, *supra*, which at that time was being reasserted in *City of Gainesville* and had been reaffirmed by the Florida Supreme Court's denial of a writ of prohibition sought by Waller on the claim of double jeopardy.

We act on the statement of the District Court of Appeal that the second trial on the felony charge by information "was based on the same acts of the appellant as were involved in the violation of the two city ordinances" and on the assumption that the ordinance violations were included offenses of the felony charge.[1]

[1] We accept the assumption of the District Court of Appeal although the record is not adequate to verify its accuracy. For example, no part of the record of the municipal court conviction has been incorporated into the record in the present case.

Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime.

In *Benton* v. *Maryland*, 395 U. S. 784 (1969), this Court declared the double jeopardy provisions of the Fifth Amendment applicable to the States, overruling *Palko* v. *Connecticut*, 302 U. S. 319 (1937). Here, as in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), *Benton* should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances.[2]

Florida does not stand alone in treating municipalities and the State as separate sovereign entities, each capable of imposing punishment for the same alleged crime.[3]

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[2] *Benton* v. *Maryland*, 395 U. S. 784 (1969), controls any case which arises in its ambit. See *Ashe* v. *Swenson*, *post*, at — n. 1. Nonetheless, when this Court granted certiorari in *Price* v. *Georgia*, No. 269, 1969 Term, it requested that counsel "brief and argue [the] question of retroactivity of *Benton* v. *Maryland*, [395 U. S. 784], and whether that decision is applicable to this case." 395 U. S. 975 (1969). By our decisions in the instant case and in *Ashe* v. *Swenson*, *supra*, we do not resolve, with respect to the circumstances presented in *Price* v. *Georgia*, *supra*, either of the two questions posed by the Court in that case.

[3] Decisions of the States which currently appear to treat municipalities and the State as separate sovereigns for double jeopardy purposes are as follows:

Pike v. *City of Birmingham*, 36 Ala. App. 53, 53 So. 2d 394, cert denied, 255 Ala. 664, 53 So. 2d 396 (1951). See also Ala. Code, tit. 37, § 594 (1958). *United States* v. *Farwell*, 11 Alaska 507, 76 F. Supp. 35 (D. C. D. Alaska 1948); *McInerney* v. *City of Denver*, 17 Colo. 302, 29 P. 516 (1892); *State* v. *Musser*, 67 Idaho 214,

Here, respondent State of Florida seeks to justify this separate sovereignty theory by asserting that the relationship between a municipality and the State is analogous to the relationship between a State and the Federal Government. Florida's chief reliance is placed upon this Court's holdings in *Bartkus* v. *Illinois*, 359 U. S. 121 (1959), and *Abbate* v. *United States*, 359 U. S. 187 (1959), which permitted successive prosecutions by the Federal and State Governments as separate sovereigns. Any such reading of *Abbate* is foreclosed. In another context, but relevant here, this Court noted—

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds* v. *Sims*, 377 U. S. 533, 575 (1964).

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176 P. 2d 199 (1946); *People* v. *Behymer*, 48 Ill. App. 2d 218, 198 N. E. 2d 729 (1964); *State* v. *Garcia*, 198 Iowa 744, 200 N. W. 201 (1924); *Earwood* v. *State*, 198 Kan. 659, 426 P. 2d 151 (1967); *State* v. *Clifford*, 45 La. Ann. 980, 13 So. 281 (1893). See also La. Crim. Pro. Code Ann. art. 597 (West 1967); *State* v. *End*, 232 Minn. 266, 45 N. W. 2d 378 (1950); *May* v. *Town of Carthage*, 191 Miss. 97, 2 So. 2d 801 (1941); *State* v. *Garner*, 360 Mo. 50, 226 S. W. 2d 604 (1950); *State* v. *Amick*, 173 Neb. 770, 114 N. W. 2d 893 (1962); *Ex parte Sloan*, 47 Nev. 109, 217 P. 233 (1923); *State* v. *Simpson*, 78 N. D. 360, 49 N. W. 2d 777 (1951); *Koch* v. *State*, 53 Ohio St. 433, 41 N. E. 689 (1895); *McCann* v. *State*, 82 Okla. Cr. 374, 170 P. 2d 562 (1946); *Miller* v. *Hansen*, 126 Ore. 297, 269 P. 864 (1928); *Webster* v. *Knewel*, 47 S. D. 142, 196 N. W. 549 (1924); *State* v. *Tucker*, 137 Wash. 162, 242 P. 363 (1926); *City of Milwaukee* v. *Johnson*, 192 Wis. 585, 213 N. W. 335 (1927); *State* v. *Jackson*, 75 Wyo. 13, 291 P. 2d 798 (1955). Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Ore. L. Rev. 281 (1964), contains a discussion of the origins and development of this "dual sovereignty" doctrine. See also Note, 1968 Duke L. J. 362.

Florida has recognized this unity in its Constitution. Article VIII, § 2 of the Florida Constitution (1968 revision) contains a grant of power to the Florida Legislature respecting municipalities: [4]

> "(a) *Establishment.* Municipalities may be established or abolished and their charters amended pursuant to general or special law . . . .
>
> "(b) *Powers.* Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services . . . ."

Moreover, Art. V, § 1 of the Florida Constitution (1885), which does not appear to have been changed in the 1968 Constitutional revision, declares:

> "[t]he judicial power of the *State of Florida* is vested in a supreme court . . . and such other courts, *including municipal courts* . . . as the legislature may from time to time ordain and establish." (Emphasis added.)

These provisions of the Florida Constitution demonstrate that the judicial power to try petitioner on the first charges in municipal court springs from the same organic law which created the state court of general jurisdiction in which petitioner was tried and convicted for a felony. Accordingly, the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of

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[4] At the time of petitioner's trial, before the 1968 revision of the Florida Constitution, Art. VIII, § 8, of the Florida Constitution (1885) gave power to the State Legislature:

"to establish, and to abolish, municipalities[,] to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton* v. *United States*, 206 U. S. 333 (1907), where this Court held that a prosecution by a court of the United States is a bar to a subsequent prosecution by a territorial court, since both are arms of the same sovereign.[5] In *Grafton* a soldier in the United States Army had been acquitted by a general court martial convened in the Philippine Islands of the alleged crime of feloniously killing two men. Subsequently, a criminal information in the name of the United States was filed in Philippine court while those islands were a federal territory, charging the soldier with the same offense committed in violation of local law. When Philippine courts upheld a conviction against a double jeopardy challenge, this Court reversed, resting upon the single sovereign rationale and distinguishing cases like *Fox* v. *Ohio*, 5 How. 410 (1847), which sanctioned successive prosecutions by State and Federal Governments for the same acts:

> ". . . An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a State can be punished only by its authority and in its tribunals. The same act . . . may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines. The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by au-

[5] See also *Puerto Rico* v. *The Shell Co. (P. R.), Ltd.*, 302 U. S. 253 (1937), where the Court in dicta approved of *Grafton*.

thority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States, and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." 206 U. S., at 354–355.

Thus *Grafton*, not *Fox* v. *Ohio*, *supra*, or its progeny, *Bartkus* v. *Illinois*, *supra*, or *Abbate* v. *United States*, *supra*, control, and we hold that on the basis of the facts upon which the Florida District Court of Appeal relied, petitioner could not lawfully be tried both by the municipal government and State of Florida. In this context a "dual sovereignty" theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

We decide only * that the Florida courts were in error to the extent of holding that—

". . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."

The second trial of petitioner which resulted in a judgment of conviction in the state court for a felony

* If petitioner has committed offenses not embraced within the charges against him in the municipal court he may, or may not, be subject to further prosecution depending on statutes of limitation and other restrictions not covered by the double jeopardy restraints of the Constitutions of Florida and of the United States.

having no valid basis, that judgment is vacated and the cause remanded to the District Court of Appeal of Florida, Second District, for further proceedings in accord with this opinion. In these circumstances we do not reach other contentions raised by petitioner.

It is so ordered.

MR. JUSTICE BLACK joins the opinion of the Court, but nonetheless adheres to the views expressed in his dissenting opinions in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959), and *Abbate* v. *United States*, 359 U. S. 187, 201 (1959).

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1969

Joseph Waller, Jr., Petitioner, *v.* State of Florida.	On Writ of Certiorari to the District Court of Appeal of Florida, Second District.

[April 6, 1970]

Mr. Justice Brennan, concurring.

I join the holding of the Court that, because the municipal and state courts of a State are part of one sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in *Ashe* v. *Swenson*, *post*, I believe that, unless this case fell within one of the exceptions to the "same transaction" rule, see, *id.*, nn. 7, 11, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.*

*I adhere to the Court's holding in *Ashe* v. *Swenson*, *post*, at 1, n. 1, that our decision in *Benton* v. *Maryland*, 395 U. S. 784 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is "fully 'retroactive.'" See also *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).